Attachment 2

No. 17-4148

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff - Appellant,

v.

KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX,
Defendants - Appellees .

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
Honorable David Sam
District Court No. 2:16-cr-00403-DS

OPENING BRIEF FOR THE UNITED STATES OF AMERICA (CORRECTED)

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Oral Argument Is Requested

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STATEMENT OF PRIOR AND RELATED CASES

There are no prior or related cases to this appeal.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this criminal prosecution under 18 U.S.C. § 3231. On August 28, 2017, the district court entered 1) an order dismissing the indictment as barred by the statute of limitations and 2) an order that the case is not subject to the per se rule (but is instead subject to the rule of reason) for purposes of determining whether the conduct charged in the indictment violates Section 1 of the Sherman Act, 15 U.S.C. § 1. A133-A143.[1] The government filed a timely notice of appeal from both orders on September 26, 2017. Fed. R. App. P. 4(b)(1)(B).

This Court has appellate jurisdiction to review the first order under 18 U.S.C. § 3731. Section 3731 also provides appellate jurisdiction over the second order. *See infra* pp. 47-51. If this Court concludes that it does not have appellate jurisdiction over the second order, the government respectfully requests that the Court construe the pertinent parts of this brief as a petition for a writ of mandamus, which

[1] Citations to the appellant's appendix take the form of A##.

the Court has the authority to issue under the All Writs Act, 28 U.S.C. § 1651. *See infra* pp. 52-57.

INTRODUCTION

This appeal arises from two orders erroneously dismissing an indictment charging a company, Kemp & Associates, Inc., and one of its executives, Daniel J. Mannix, with conspiring with a competitor to suppress and eliminate competition by allocating customers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In the first order, the district court dismissed the indictment as untimely based upon its erroneous conclusion that the conspiracy ceased when the last customer was allocated, even though the conspirators continued to collect payments under the allocated customer contracts and shared those payments with each other. The order is in direct conflict with this Court's precedents, which reject exactly that view. In *United States v. Evans & Associates Construction Co.*, this Court held that a Sherman Act conspiracy to suppress or eliminate competition for contracts continues until a conspirator accepts "the last payment on the contract." 839 F.2d 656, 661 (10th Cir. 1988). And thus, when a conspirator receives "any money" from an allocated

contract, "that [is] sufficient to delay the start of the statute" of limitations. *Id.* In *United States v. Morgan*, this Court held that conspiracy continues at least until the "distribution of the proceeds of a conspiracy" is complete. 748 F.3d 1024, 1036-37 (10th Cir. 2014). Here, the conspirators received payments and distributed the proceeds from the allocated contracts within the limitations period, as the defendants conceded below.

In the second order, the court wrongly precluded the government from proceeding to trial under its sole theory of liability: that the conduct alleged in the indictment is a per se illegal restraint of trade. It is well established that customer allocation agreements are subject to condemnation under the per se rule. *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990). The district court identified no sound basis for ignoring controlling precedent and departing from the per se rule here, and there is none. Its order "quite obviously is inconsistent" with binding precedent. *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 349 (1982).

STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court erred in concluding that the five-year statute of limitations bars an indictment alleging that the members of a conspiracy to allocate customers received, and distributed among themselves, the proceeds from the allocated customer's contracts within five years of indictment.

2. Whether the district court erred in concluding that the per se rule does not apply to the alleged conspiracy to allocate customers because of the defendants' assertions that the conspiracy 1) applied only to new customers, 2) affected a small part of society, 3) arose in a unique and unusual industry, and 4) had efficiency-enhancing potential.

STATEMENT OF THE CASE

On August 17, 2016, a District of Utah grand jury returned a one-count indictment charging Kemp & Associates, Inc., and its Director of Operations and Vice President/COO, Daniel Mannix, with conspiring "to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services sold in the United States," in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. A18. The

indictment alleged that the conspiracy lasted from at least September 1999 to January 29, 2014. *Id.*

I. The Conspiracy to Allocate Customers of Heir Location Services

Providers of heir location services offer individuals who may be heirs to intestate estates the services associated with securing their inheritance. The providers identify such heirs "and, in exchange for a contingency fee, develop evidence and prove [the] heirs' claims to an inheritance in probate court." A17. Potential heirs who have not yet signed contracts with, and thus are not yet a customer of, an heir location service provider may receive offers from one or more such providers. *Id.* If multiple providers identify the same unsigned potential heir, one of the ways they may compete to sign the heir is by offering "more attractive contingency fee rates." *Id.*

The defendants and a competing heir location service provider[2] conspired to suppress and eliminate competition between them for these

[2] Richard A. Blake, Jr., the owner and president of the other heir location service provider, pleaded guilty to the same conspiracy as charged in the indictment at issue in this appeal. *See United States v. Blake*, No. 1:16-cr-00025, Dkt. No. 21 (N.D. Ill. Mar. 8, 2016).

unsigned heirs, including competition on contingency fee rates, "by agreeing to allocate customers of Heir Location Services sold in the United States." A18. The conspirators "agreed . . . that when both co-conspirator companies contacted the same unsigned heir to an estate, the co-conspirator company that first contacted that heir would be allocated certain remaining heirs to that estate who had yet to sign a contract with an Heir Location Services provider." A19. In exchange for a portion of any contingency fees collected by the first company, the second company agreed not to compete for the business of that heir and certain other unsigned heirs to the same estate. *Id*. Pursuant to this allocation, the first company would "submit[] offers to provide Heir Location Services, which included contingency fee rate quotations, to potential heirs" it first contacted, while the second company would "refrain[] from submitting offers and quotations to potential heirs" allocated to the first company. *Id*. The first company signed the allocated customers at noncompetitive prices, proved the heirs' claim to the estate, and collected from them "collusive and noncompetitive" contingency fees. A19-A20. After the fees were collected, the first

company paid to the second "a portion of the contingency fees ultimately collected from those allocated heirs" pursuant to the agreement. A19.

The indictment charged that the conspiracy continued as late as January 29, 2014. A18. And it alleged that the conspirators "carr[ied] out the [charged] conspiracy" by, among other things, accepting payments for heir location services sold to heirs at collusive contingency fee rates and making payments to, and receiving payments from, each other. A18-A20. Defendants concede that such payments continued into the limitations period. *See also* A194.

II. Proceedings and Decisions Below

On March 31, 2017, the defendants filed a "Motion For Order That The Case Be Subject To The Rule Of Reason And To Dismiss The Indictment." A147-A203. The motion requested: 1) an order that the government cannot proceed to trial under the per se rule but must instead try the case under the rule of reason, 2) an order dismissing the indictment because the Due Process Clause precludes a criminal prosecution under the rule of reason, and 3) an order dismissing the indictment as barred by the statute of limitations. A153.

The motion invited the court to look beyond the indictment's allegations by including documentary exhibits and descriptions of the defendants' ongoing data analysis that defendants assert show the nature and effect of the conspirators' agreement. *See generally* A153, A184-A186, A213-A215, A216-A217, A226-A229. The government opposed the motion and the consideration of these factual matters outside the indictment. A239, A250; *see also* A56-A57.

On June 21, 2017, the district court (Sam, J.) held a hearing on the motion. At the hearing, the court stated that its ruling "will be" that this "is a Rule of Reason case because it is unique and unusual," "doesn't affect a very large part of our society," is "just very narrowly focused," and "doesn't seem to me to fit the classic Sherman Antitrust Act type cases." A81-A82. The court asked the defendants to prepare an order for the court to sign. A84. The court reserved ruling on the statute of limitations issue and did not mention the Due Process issue. A82-A84.

On July 14, 2017, the government filed a motion seeking reconsideration of the oral ruling, objecting to the defendants' proposed order, and requesting a ruling on the statute of limitations issue. In

particular, the government asked the court to "reconsider its holding that the per se rule does not apply to the conspiracy as charged" because it conflicted with binding precedent holding a customer allocation agreement is per se unlawful, and any decision that the conduct was something other than the charged, per se unlawful agreement improperly resolved factual disputes related to the ultimate issue in the case. A87-A98.

On August 28, 2017, the district court adopted the defendants' proposed order verbatim, A133-A136, denied the government's motion for reconsideration, and granted the defendants' motion to dismiss the indictment as time barred, A137-A143. In the Rule of Reason Order, the court concluded that the per se rule does not apply to this case because the challenged agreement 1) arose in a unique and unusual industry, 2) applied only to new customers, 3) affected a small part of society, and 4) contained efficiency-enhancing potential. A137-A143. In the Limitations Order, the court concluded that this case was time barred because the conspiracy ended in 2008, after the initial allocation of the last estate subject to the agreement. A137-A143. In the same

order, the court denied reconsideration based upon its reasoning at the hearing and in the Rule of Reason Order. *Id.*

On September 26, 2017, the government noticed its appeal of both orders.

SUMMARY OF ARGUMENT

Two erroneous rulings by the district court that contravene controlling precedent of this Court (and the Supreme Court) have brought the prosecution of this straightforward per se illegal customer allocation conspiracy to a halt.

First, the court dismissed the indictment as untimely, mistakenly concluding that it ended when the last customer was allocated and no additional competition was eliminated, even though the conspirators continued to collect payments under the contracts with allocated customers and to divide those payments within five years of indictment. In *United States v. Evans & Associates Construction Co.* (*Evans*), 839 F.2d 656, 661 (10th Cir. 1988), this Court reversed a district court for making the very same mistake. The Court unequivocally held that the conspirators' continued receipt of the proceeds of a Sherman Act conspiracy, including the last payment on an affected contract,

demonstrated that the conspiracy continued and thus delayed the commencement of the limitations period. Here, the district court and the defendants offered no valid basis to distinguish *Evans*, and there is none. In every relevant respect, the indictment in *Evans* parallels the indictment here.

The district court's dismissal also contravenes this Court's holding in *United States v. Morgan*, 748 F.3d 1024, 1036-37 (10th Cir. 2014), that a conspiracy continues at least until the distribution of its proceeds. The court and defendants again offered no valid reason (and there is none) why the distribution by the conspirators of the proceeds from the contracts with the allocated customers does not demonstrate that the conspiracy continued into the limitations period here.

Second, the district court erroneously concluded that the charged customer allocation conspiracy should be analyzed under the rule of reason and not condemned as per se illegal, if proven. But binding precedent holds that customer allocation agreements are, as a category, per se illegal and thus condemned without further inquiry into their reasonableness. *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469,

473 (10th Cir. 1990). The charged customer allocation conspiracy cannot be removed from this per se category based on defendants' (disputed) assertions, even if true, that the allocation applied only to new customers, affected only a small number of estates, arose in an obscure industry, or contained purportedly efficiency-enhancing potential. By doing so, the district court contravened this Court's and the Supreme Court's precedent.

This Court has the power to correct the district court's errors under 18 U.S.C. § 3731. That section provides that an order is appealable if it formally dismisses an indictment (as the Limitations Order does), or if the order does not formally dismiss the indictment but is nonetheless tantamount to a dismissal by having that effect or foreclosing a distinct theory of liability (as the Rule of Reason Order does). But even if this Court concludes that Section 3731 does not provide jurisdiction over the Rule of Reason Order, the government respectfully requests that the Court treat the relevant parts of this brief as a petition for writ of mandamus. In this case, the antitrust issue is so fundamental, the error so manifest, and review otherwise so elusive, that the extraordinary remedy of mandamus is fully warranted.

STANDARD OF REVIEW

This Court reviews *de novo* a decision dismissing an indictment as barred by the statute of limitations, including "the district court's legal conclusion concerning the scope of the conspiracy." *United States v. Qayyum*, 451 F.3d 1214, 1218 (10th Cir. 2006). The grand jury "need not" charge facts establishing the timeliness of the action; the statute of limitations is an affirmative defense and not an element of the crime. *Smith v. United States*, 568 U.S. 106, 112 (2013).

This Court reviews *de novo* the district court's Rule of Reason Order as a dismissal for failure to allege a per se offense. *United States v. Giles*, 213 F.3d 1247, 1248-49 (10th Cir. 2000); *United States v. Hall*, 20 F.3d 1084, 1088 (10th Cir. 1994). (If the Court concludes that this order is not an appealable dismissal under 18 U.S.C. § 3731, then the standard applicable to a mandamus petition applies, *see infra* pp. 53-54.)

This Court "must" assume "the indictment's allegations are true" "at this stage of the proceedings." *Qayyum*, 451 F.3d at 1219. The indictment "should be read in its entirety, construed according to common sense and interpreted to include facts which are necessarily

implied." *United States v. Phillips*, 869 F.2d 1361, 1364 (10th Cir. 1988) (quoting *United States v. Martin*, 783 F.2d 1449, 1452 (9th Cir. 1986)).

ARGUMENT

I. The Indictment Was Timely Because the Conspiracy Continued Through January 2014 as Demonstrated by the Receipt and Division of the Conspiracy's Proceeds up to this Date

The district court erred in dismissing the indictment's single Sherman Act conspiracy count as untimely. The district court committed this error because it mistakenly concluded that the alleged conspiracy ended after the last customers were allocated, rather than continuing as long as the conspirators collected and distributed payments from the contracts with the allocated customers. This conclusion conflicts with well-established precedent in this Circuit and others holding that conspiracies continue as their members collect and distribute the conspiracies' proceeds, that is, until the last contractual payment is received or divided by the conspirators.

A. The Conspirators' Receipt and Division of the Conspiracy's Proceeds Continues the Conspiracy and Thus Delays the Start of the Statute of Limitations

The Sherman Act offense charged here is subject to the five-year statute of limitations provided by 18 U.S.C. § 3282(a). A Sherman Act

conspiracy prosecution is timely if the conspiracy exists within the relevant limitations period, which, in this case, is the five-year period beginning August 18, 2011, A16-A21. *See Grunewald v. United States*, 353 U.S. 391, 396-97 (1957). An indictment's allegations determine the scope of the conspiracy. *Qayyum*, 451 F.3d at 1218. The indictment here alleges a Sherman Act conspiracy to allocate customers by having one conspirator make the allocated customer a contractual offer while the other refrains from making a competing offer. Such a conspiracy "remains actionable until its purpose has been achieved or abandoned, and the statute of limitations does not run so long as the co-conspirators engage in overt acts designed to accomplish its objectives." *United States v. Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir. 1981); *see United States v. Kissel*, 218 U.S. 601, 607 (1910).

"Every circuit," including this one, "that has addressed th[e] issue has concluded that a criminal conspiracy to restrain trade by collusive, anti-competitive bidding continues for the purposes of the five year statute of limitations until either the final payments are received under the illegal contract or the final distribution of illicit profits among the conspirators occurs." *United States v. Dynalectric Co.*, 859 F.2d 1559,

1565 (11th Cir. 1988).[3] In *United States v. Evans & Assocs. Const. Co.* (*Evans*), this Court held that a Sherman Act conspiracy to suppress or eliminate competition for contracts does not end when the contract or contracts are obtained, but continues until a conspirator "accepted the last payment on the contract." 839 F.2d 656, 661 (10th Cir. 1988). Thus, the receipt of "any money" by any conspirator from an allocated contract is "sufficient to delay the start of the statute" of limitations. *Id.*

Likewise, in *United States v. Morgan*, this Court held that "the distribution of the proceeds of a conspiracy is an act occurring during

[3] *See United States v. Anderson*, 326 F.3d 1319, 1328 (11th Cir. 2003); *United States v. N. Improvement Co.*, 814 F.2d 540, 541-44 (8th Cir. 1987); *United States v. A-A-A Elec. Co.*, 788 F.2d 242, 245-46 (4th Cir. 1986); *Inryco*, 642 F.2d at 293-95; *see also United States v. Walker*, 653 F.2d 1343, 1346-47 (9th Cir. 1981) (holding that a conspiracy to defraud the government by rigging bids for timber contract did not end with the contract's award "because the agreement itself aimed beyond merely defeating the government process of competitive bidding and encompassed the ultimate objective of making excess profits to be shared among the co-conspirators"); *United States v. Girard*, 744 F.2d 1170, 1172-74 (5th Cir. 1984) (holding that conspiracy to defraud by rigging bids to secure contract did not end with the contract's award but continued as conspirator accepted contractual payments because his "interest lay not in securing the contract itself, but in obtaining the money thereunder").

the pendency of the conspiracy." 748 F.3d 1024, 1036-37 (10th Cir. 2014) (quoting *United States v. Davis*, 766 F.2d 1452, 1458 (10th Cir. 1985)). And thus, the distribution of proceeds also delays the start of the statute of limitations.

The indictment alleged that defendants engaged in a conspiracy "to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services," which continued until "January 29, 2014." A18. The indictment further alleged that the conspiracy's purpose was carried out by, among other things, the conspirators: 1) submitting offers and withholding offers to potential customers, 2) accepting payments for the services sold to the allocated customer at collusive and noncompetitive contingency fee rates, and 3) paying a portion of these payments to the co-conspirator company or receiving a portion of these payments from the co-conspirator company. A19-A20. In this way, the conspirators received payments on the allocated contracts and distributed those proceeds among themselves. Indeed, defendants do not dispute that some of these acts—receipt and division of the conspiracy's proceeds—were performed within five years of the indictment's filing. *See also* A194. Thus, under controlling precedent,

Evans, 839 F.2d at 661; *Morgan*, 748 F.3d at 1036-37, the indictment was timely.

B. The District Court Erred by Concluding that the Conspiracy Ended When a Conspirator Signed the Final Allocated Customer

In concluding that the indictment was untimely, the district court committed the same mistake that this Court corrected in *Evans*. The district court erroneously held that the conspiracy ended when the conspirators ceased allocating future customers because the court mistakenly believed that the conspiracy's purpose did not include collecting payments on contracts with allocated customers or dividing those payments. A141-A142. The district court in *Evans* likewise believed that the statute of limitations began to run at the moment competition was eliminated, which, in that bid-rigging case, was "when the bids were let." 839 F.2d at 661.

This Court reversed, holding that the statute does not begin to run on a criminal Sherman Act conspiracy "until after the successful contractor accepted the last payment on the contract." *Id.* The Court explained that the "Sherman Act violation was 'accomplished both by the submission of noncompetitive bids *and* by the request for and

receipt of payments at anti-competitive levels.'" *Id.* (quoting *Northern Improvement*, 814 F.2d 540 at 543 n.2); *see also Northern Improvement*, 814 F.2d at 542 ("[T]he object and purpose of this illegal agreement was 'illicit gain,' the receipt of payments, and we conclude that the district court erred in holding that the purpose of the conspiracy terminated the moment the bids were submitted.").

As in *Evans*, when the indictment here is "'read in its entirety'" and "'construed according to common sense,'" *Phillips*, 869 F.2d at 1364 (quoting *Martin*, 783 F.2d at 1452), it is apparent that the conspirators' receipt and distribution of the proceeds from the contracts with allocated customers were within the scope of the conspiracy. The Court is "not deal[ing] here with criminal behavior that is an end in itself," but rather "[c]ommon sense tells us that the conspirators' purpose was to reap the benefit of the conspiracy: to be awarded [the heir location service] contracts at anti-competitively high prices and to be paid for those contracts." *Northern Improvement*, 814 F.2d at 542; *see also Girard*, 744 F.2d at 1172-73. Indeed, courts have found it "inconceivable . . . that any business would conspire to restrain trade solely for the sake of restraining trade," as the "attendant battery of

civil and criminal penalties for antitrust violations simply is too threatening to convince us that anybody would attempt to restrain trade without also having the further goal of financial self-enrichment by virtue of the restraint of trade." *Dynalectric*, 859 F.2d at 1568; *see Anderson*, 326 F.3d at 1328 (holding that the "conspiracy continued until the conspirators received the full economic benefits anticipated by their bid-rigging scheme," including payment on a contract they bid on seven years earlier).

There is no basis for the district court's conclusion that "economic enrichment" was the purpose in *Evans* but not here. A141. Its conclusion cannot be based on "the evidence in *Evans*" showing "that the central purpose of the conspiracy was to obtain wrongful proceeds or money," *id.*, because there was no evidence in *Evans*: this Court reversed a pre-trial dismissal of the indictment.

The district court's conclusion also cannot be based on any difference between the indictments here and in *Evans*. The indictments in both cases charge a conspiracy to suppress competition whose substantial term was the mechanism by which the conspirators

eliminated competition.[4] And both indictments alleged that the conspirators suppressed and eliminated competition by coordinating their offers for contracts.[5] They both also identified receipt of payments as a means of effectuating the conspiracy, and neither explicitly alleged that the conspiracy's purpose was "economic enrichment." A141.[6]

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[4] *Compare* A18 (*Kemp* Indictment ¶¶ 9-10) (alleging "conspiracy . . . in unreasonable restraint of" trade, in which defendants conspired "to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services sold in the United States," and for which the "substantial terms" were "to allocate customers of Heir Location Services sold in the United States"), *with* Indictment ¶¶ 13-14, *United States v. Evans & Assocs. Constr. Co.*, 1987 WL 9899 (W.D. Okla. Jan. 22, 1987) (No. CR-86-77-E) ("*Evans* Indictment"), *available at* https://www.justice.gov/atr/page/file/1018136/download (alleging "conspiracy in unreasonable restraint of" trade, "a substantial term of which was to submit collusive, noncompetitive and rigged bids to, or to withhold bids from, the Oklahoma Department of Transportation").

[5] *Compare* A19 (*Kemp* Indictment ¶ 11(g)), *with Evans* Indictment ¶ 14.

[6] *Compare* A18, A20 (*Kemp* Indictment ¶ 11, 11(i)) (alleging that, "[f]or the purpose of forming and carrying out the combination and conspiracy alleged in this indictment," the defendants "accepted payment for Heir Location Services sold to heirs in the United States at collusive and noncompetitive contingency fee rates"), *with Evans* Indictment ¶ 15, 15(e) (alleging that acts done "[f]or the purpose of forming and effectuating the aforesaid combination and conspiracy" included "[r]eceiving and accepting from the Oklahoma Department of Transportation payments for work performed on the aforementioned Federal-Aid highway construction project").

Evans thus cannot be distinguished on the basis of the indictments' allegations because in all relevant respects the two indictments are parallel.[7]

The charged conspiracy in *Evans* also cannot be distinguished on the ground that it involved rigging "the bid for one contract which was bid, granted, completed and fully paid within the two years," while the customer allocation agreement here rigged the offers for "269 allegedly affected estates." A142. Nothing in *Evans* supports the notion that had the defendants there rigged the bidding for numerous contracts, their more extensive conspiracy would not have continued to the last payment received, but rather would have ended—perhaps earlier than the actual one-contract conspiracy—when the last of the contracts was let.

In any event, imposing artificial limits on the time for, or the number of, payments received that qualify as overt acts in furtherance

[7] A comparison with the indictment in *Northern Improvement* yields the same conclusion. *Compare* A18-A20 (*Kemp* Indictment ¶¶ 9-11), *with* Indictment ¶¶ 18-19, *United States v. N. Improvement Co.*, 632 F. Supp. 1576 (D.N.D. 1986) (Crim. No. C3-85-062), *available at* https://www.justice.gov/atr/page/file/1018141/download.

of a conspiracy makes no sense and has no statutory basis. It would have courts arbitrarily deciding case-by-case how many payments were too many or what period of time for payments was too long, thus depriving both the government and defendants of any certainty on when the statute of limitations ran.[8] This does not mean that there is "significant arbitrariness regarding the length of the limitations period." A142. The limitations period is five years. 18 U.S.C. § 3282(a). What varies is how long the conspiracy continues, which always depends on the conspirators' agreement and actions. For a Sherman Act conspiracy, this Court has held that the conspiracy continues at least until a conspirator commits the last act in furtherance, including a conspirator accepting the last payment on an affected contract. The number of contracts or the duration of their performance makes no difference.

[8] In fact, the payment period in several cases cited is comparable to or greater than here. *See Anderson*, 326 F.3d at 1325-26 (contract bid July 2, 1989; final payments received September 20, 1996); *Dynalectric*, 859 F.2d at 1562 (subcontract bid September 7, 1979; final payment received January 24, 1985); *Walker*, 653 F.2d at 1344 (contract bid June 23, 1972; timber cut and paid for in August and September 1975).

It would also make no difference if the district court were correct that the payments on their face appeared to be "ordinary, non-criminal events." A142. The receipt of the payment in *Evans* appears just as ordinary and non-criminal as the receipt of payments here. An act's superficially "ordinary" or "non-criminal" appearance is irrelevant because acts "innocent, indeed, of themselves" take on their "criminal taint from the purpose for which they were done." *Hyde v. United States*, 225 U.S. 347, 360 (1912); *see also Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) ("[T]he act can be innocent in nature, provided it furthers the purpose of the conspiracy."); *Braverman v. United States*, 317 U.S. 49, 53 (1942) (explaining that an overt act "may be that of only a single one of the conspirators and need not be itself a crime"); *Girard*, 744 F.2d at 1174 ("Even though the acceptance [of payment], in and of itself, was perfectly legal, it still satisfies the requirement of an overt act because of the agreement's illegal purpose.").

Lastly, quoting out-of-circuit precedent, the district court purports to distinguish *Evans* because, in its view, the "'unique threats to society posed by a conspiracy'" here have passed. A141 (quoting *United States v. Doherty*, 867 F.2d 47, 62 (1st Cir. 1989)). But unlike *Doherty*—a case

about stolen police promotion exams and higher police salaries—*Evans* and the conspiracy charged here involve the collection of a final payment on an affected contract in furtherance of a Sherman Act conspiracy. If *Doherty* were interpreted to hold that the unilateral collection of such a payment cannot continue a conspiracy like the one here, then it would conflict with this Court's holding in *Evans*. Likewise, if *Doherty* were interpreted to hold that such payment's collection were the mere "results of [the] conspiracy" and not "actual conduct in furtherance of it," *id.*, *Doherty* would again conflict with *Evans*.[9]

In any event, even assuming *Doherty* were relevant here (which it is not), it does not support the district court's ruling. The "distinct danger[]" posed by conspiracy is "collective" or "[c]oncerted" action, which includes continued cooperation in the form of payoffs and

[9] *See also Anderson*, 326 F.3d at 1328 (rejecting defendant's contention that "payment was not an *overt act* in furtherance of the conspiracy but merely the *result* of the conspiracy"); *Walker*, 653 F.2d at 1347 (rejecting defendant's view of "payment . . . and division of profits on the [rigged contracts for] timber as merely the continuing *result* of the conspiracy" and concluding that "the conspiracy was a continuing one within the meaning of *Kissel* and *Fiswick* [*v. United States*, 329 U.S. 211 (1946)]").

distributions of proceeds among the conspirators. *Iannelli*, 420 U.S. at 778. *Doherty* itself recognized that the "special societal dangers of conspiracy" existed when "the payoff itself required cooperation; for instance . . . in *Walker*, 653 F.2d at 1347, the realization and division of profits required 'continuing cooperation.'"[10]

Indeed, while the *Evans* indictment alleged only that a single conspirator "received payments" within the limitations period and that "no division of these payments among the conspirators" was made, 839 F.2d at 661, the indictment here does allege division of spoils in addition to receipt of payments. A19-A20 (*Kemp* Indictment ¶ 11(f) (division of proceeds), ¶ 11(i) (receipt of payments)). It "'is well settled that the distribution of the proceeds of a conspiracy is an act occurring during the pendency of the conspiracy.'" *Morgan*, 748 F.3d at 1036 (quoting *Davis*, 766 F.2d at 1458). This well-established rule makes perfect sense: If conspirators are actively making payments to each

[10] 867 F.2d at 61-62; *see United States v. Grimm*, 738 F.3d 498, 504 n.6 (2d Cir. 2013) (explaining that *A-A-A Electric* and *Walker* are consistent with *Doherty*'s approach because they involve continued concerted action in the form of "payoffs to co-conspirators [that] continued after [the] award of [the] contract" and continued division by the conspirators of "profits from [the] scheme on a yearly basis").

other for their role in the conspiracy, then the conspiratorial agreement must still be in place.[11] For this reason too, the indictment was timely.

II. The District Court Erred by Dismissing the Grand Jury's Per Se Charge in Advance of Trial Because the Indictment Properly Charged a Per Se Violation

The district court erred when it barred the government from proceeding to trial on the charged per se offense. The indictment charges an agreement among horizontal competitors to allocate customers. The Supreme Court and this Court have long recognized that such an agreement "constitutes a *per se* violation of § 1 of the Sherman Act." *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990); *see Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam). The district court's departure from the binding precedent of this Court and the Supreme Court is unjustified and threatens to undermine the government's ability to prosecute antitrust conspiracies that have long been condemned as per se illegal.

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[11] *See Walker*, 653 F.2d at 1347-48 (recognizing that payoffs among conspirators are "a material element of the agreement" because failure to make such a payment would be a "breach[]" of the conspiratorial agreement); *cf. Kissel*, 218 U.S. at 607 (explaining that the statute of limitations does not begin to run so long as there is "continuous co-operation of the conspirators to keep [the conspiracy] up").

A. The Indictment Alleges a Per Se Unlawful Customer Allocation Agreement

Section 1 of the Sherman Act outlaws any "contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Courts have long interpreted this language to prohibit only "unreasonable" restraints of trade. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992). Most restraints are analyzed under the rule of reason, which requires the plaintiff to present evidence of a restraint's anticompetitive effects and permits the defendant to present procompetitive justifications. Ultimately, the fact-finder weighs all the circumstances to determine whether the restraint is one that suppresses competition or promotes it. *See Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918).

Restraints that have been deemed to be unlawful per se—such as the customer allocation agreement at issue here—are not analyzed under the rule of reason. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). "The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint." *Id.* Such

treatment is reserved for categories of restraints that are manifestly anticompetitive and "'would always or almost always tend to restrict competition.'" *Bus. Elecs. Corp.*, 485 U.S. at 723 (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985)). "[N]o offsetting economic or efficiency justifications salvag[e]" a restraint that is deemed per se unlawful. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994).

Thus, "[u]nder a per se rule, plaintiffs prevail simply by proving that a particular contract or business arrangement . . . exists." *In re Cox Enters., Inc.*, 871 F.3d 1093, 1097 (10th Cir. 2017); *see also United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981) ("In cases involving behavior such as bid rigging, which has been classified by courts as a per se violation, the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'" (quoting *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979))).

This Court—relying on "the analysis of the Supreme Court," its own prior holdings, and decisions of other circuits—has held that an "agreement to allocate or divide customers between competitors within

the same horizontal market" is a per se violation of the Sherman Act. *Suntar Roofing*, 897 F.2d at 473 (collecting cases). An agreement not to compete for certain customers is manifestly anticompetitive because it forces the allocated customer to "face[] a monopoly seller" rather than reap the benefits of competition between conspirators that would result in lower prices or better product offerings. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994). Such an agreement to "rotate or otherwise allocate customers among the conspirators" has effects "almost identical to those of price-fixing and is treated the same by the law." *Id.*; *see also Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) ("It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them.").

In *Hammes*, a group of five transmission repair dealers allegedly agreed to jointly advertise their services and list five phantom dealers. 33 F.3d at 777. "A call to one of the five numbers is automatically forwarded, in accordance with a preexisting agreement, to one of the

dealers in the pool." *Id.* The court concluded that "[s]uch an out-and-out scheme of customer allocation would be a per se violation of section 1" because, absent this automatic call forwarding scheme, customers would "have a real and not merely theoretical choice between dealers." *Id.* at 782 (citing *Palmer*, 498 U.S. 46). Similarly, in *United States v. Flom*, the court held that it was "a per se violation of the Sherman Act" for re-bar suppliers to "allocate[] the business on upcoming construction contracts among their respective companies" by selecting the winning conspirator and having the others submit higher bids or no bids at all. 558 F.2d 1179, 1182-83 (5th Cir. 1977).

In the same way, defendants have entered into an equally straightforward customer allocation scheme. Defendants agreed that, "when both co-conspirator companies contacted the same unsigned heir to an estate, the co-conspirator company that first contacted that heir would be allocated certain remaining heirs to that estate." A19. The first company then submitted an offer, while the second company "refrained from submitting offers and quotations to potential heirs." *Id.* Like the defendants in *Hammes* and *Flom*, defendants have eliminated competition at precisely the point at which competition for unsigned

heirs might otherwise occur: when the co-conspirators each contact the same heir. Rather than reap the benefits of such competition, heirs are forced to face a single seller.

That the conspirators continued to compete to be the first company to contact an heir cannot save their agreement from per se condemnation. As the Supreme Court explained in *Catalano*, an agreement "extinguishing one form of competition among the sellers" is condemned as per se unlawful regardless of the potential for competition in other forms. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980) (per curiam). Defendants here have agreed to eliminate competition on contingency fee rates at the precise moment at which such competition would take place. That agreement falls into a category found to be manifestly anticompetitive and, thus, is illegal per se.

B. The District Court Erred in Holding that the Indictment Did Not Allege a "Classic Customer Allocation"

The district court recognized that the charged agreement was an agreement to allocate customers, A135, but erred by refusing to apply the per se rule, in contravention of binding precedent. The court said it could not "predict with any confidence, and does not believe, that the

[agreement] operated as a classic customer allocation" because it 1) was structured in an "unusual way" in that it applies to new customers, 2) impacted only a "small number of estates," and 3) occurred in a "relatively obscure industry." *Id.* But whatever doubts the district court may have about treating a particular customer allocation agreement as per se unlawful or about categorizing customer allocations as per se unlawful, the Supreme Court has held that such agreements are per se unlawful, and it is the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

The indictment alleges that defendants engaged in a prototypical customer allocation agreement. But even if it did not, the fact that a particular "agreement to divide the market" does "not fit precisely the characterization of a prototypical *per se* practice does not remove it from *per se* treatment." *See United States v. Andreas*, 216 F.3d 645, 666-67 (7th Cir. 2000). None of the features identified by the district court justify departure from the per se rule.

1. There is no exception to the per se rule for allocations of new customers, and thus the district court erred in refusing to apply the per

se rule to the charged agreement to allocate new, rather than existing, customers. A134-A135. Indeed, the *Hammes* court condemned as per se unlawful an agreement to allocate new customers, 33 F.3d at 782, and the *Flom* court held per se unlawful an agreement to allocate future construction contracts, 558 F.2d at 1182-83. *Cf. United States v. Consol. Laundries Corp.*, 291 F.2d 563, 575 (2d Cir. 1961) (reasoning that an "agreement to suppress all competition as to one phase of [a defendant's] business, i.e. old customers, should be *per se* illegal irrespective of their competition for new customers"). New customers are no less entitled to the benefits of competition, and the harm to competition is no less manifest in an allocation of new customers. Instead, in some cases, the only effective means to eliminate competition through customer allocation is to allocate new customers.

Likewise, the fact that defendants' allocation agreement was not based on geography does not make the per se rule inapplicable. As the Fifth Circuit explained in *United States v. Cadillac Overall Supply Co.*, that is "a distinction without substance." 568 F.2d 1078, 1088 (5th Cir. 1978). Customer allocation agreements "hamper[] the free choice of the consumer of the parties with whom the consumer would transact

business, and provide[] no incentive to achieve maximum efficiency on an industry wide basis." *Id.* at 1089. That is true regardless of the basis on which the customers are allocated.

Moreover, territorial allocation of customers would make little sense in this industry. Firms search for estates nationwide, and there is frequently no competition because only one firm identifies the potential heir. Whether the defendants would face competition for any particular heir thus has nothing to do with geography. Defendants needed to eliminate competition only when it existed, and that is what their conspiracy accomplished, allocating heirs just when those heirs should have had the benefit of competition. *See* A17-A20.

2. The district court erroneously thought the per se rule could not apply to an allocation agreement that "affected a small number of estates." A135; *but see* A142 (noting "269 allegedly affected estates"). The applicability of the per se rule does not depend on the number of victims of the challenged restraint. This Court has repeatedly applied the per se rule to conduct that harms only a single purchaser or is local in nature. *See, e.g.*, *Reicher*, 983 F.2d 168 (holding per se unlawful a conspiracy to rig bids for a single contract); *United States v. Metro.*

Enters., Inc., 728 F.2d 444 (10th Cir. 1984) (affirming conviction for conspiracy to rig bids to repave portions of a highway in Oklahoma). And while customer allocation agreements often harm many customers, there is no exception to the per se rule for agreements that are of a "limited nature." *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1371-72 (6th Cir. 1988) (per curiam).

3. The district court was also wrong to conclude that the per se rule cannot apply because, in the district court's view, heir location services is a "relatively obscure industry." A135. The Supreme Court has long held that "the Sherman Act . . . establishes one uniform rule applicable to all industries alike," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940), and rejected "the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation," *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982). The district court's reasoning "ignores the rationale for *per se* rules, which in part is to avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been

unreasonable—an inquiry so often wholly fruitless when undertaken.'" *Maricopa*, 457 U.S. at 351 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

In any event, the unusual aspect of the heir location business defendants asserted below—i.e., the upfront outlay of resources for a product only saleable to one or a handful of potential customers, A173—is not unique to this industry. Many businesses, for example real estate development, can require a substantial outlay of resources to prepare a bespoke proposal or bid to compete for a particular project or contract that cannot be reused for other projects or contracts.[12] Yet, "[w]hatever may be [an industry's] peculiar problems and characteristics," *Socony-Vacuum Oil Co.*, 310 U.S. at 222, the per se rule nonetheless applies if competitors agree with each other to allocate customers.

[12] *See, e.g.*, Jonathan O'Connell et al., *Halt to the Search for New FBI Building Prompts Frustration*, Wash. Post, July 11, 2017, at A11 (reporting that "[r]eal estate developers who devoted more than two years to their proposals and spent millions of dollars designing and planning a new [FBI headquarters] threw up their hands" when officials cancelled plans to build a new headquarters; an estimated "$50 million had been spent by local companies and jurisdictions on the now-dashed project"; one potential developer spent "$8 million on its plans").

C. The District Court Erred in Holding that the Per Se Rule Could Not Apply Based on Its Conclusion that the Agreement Has the "Potential for Increased Efficiency"

Lastly, the district court erred in refusing to apply the per se rule because, in the court's view, defendants' customer allocation agreement "contained efficiency-enhancing potential." A135. Claimed efficiencies cannot be used to justify a per se unlawful agreement, and in any event, none exist here. And to the extent the district court concluded that the charged agreement was ancillary to a productive joint venture, that conclusion is factually baseless and legally unjustified.

1. The district court's reasoning "indicates a misunderstanding of the *per se* concept." *Maricopa*, 457 U.S. at 351. The per se rule adopts a "categorical judgment[] with respect to certain business practices that have proved to be predominantly anticompetitive." *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 289. Thus, when a restraint is within a category deemed per se unlawful, "no offsetting economic or efficiency justifications" can "salvag[e]" it. *SCFC*, 36 F.3d at 963. The rule "eliminates the need to study the reasonableness of an individual restraint" and thereby gives "clear guidance for certain conduct." *Leegin*, 551 U.S. at 886; *see also Maricopa*, 457 U.S. at 344 (explaining

that the Supreme Court adopted per se rules for "the sake of business certainty and litigation efficiency" by making clear that certain "kind[s] of restraint[s]" are categorically illegal).

Thus, defendants' claimed efficiencies cannot justify departure from the per se rule. "The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984). While it is doubtful that this, or any other, per se unlawful agreement among competitors would pass muster under the rule of reason, *see United States v. U.S. Gypsum Co.*, 438 U.S. 422, 476 (1978) (Stevens, J., concurring in part and dissenting in part), the per se rule prohibits courts from searching for such an agreement if it did exist. *See Catalano*, 446 U.S. at 649 ("[T]he fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*.").

In any event, the "age-old cry of ruinous competition" is no defense, *Socony-Vacuum*, 310 U.S. at 221, and what defendants

mistakenly label "efficiencies" are nothing more than the avoidance of competition, *see* A183. For example, defendants claim that when two firms faced competition for a single estate, one firm could—absent the agreement—disclose enough information for the heir to circumvent both firms and work directly with the administrator for the estate without paying either conspirator. A182-A183. Defendants argue their agreement is "output-increasing" because it avoids this scenario. *Id.* But output is not increased; only the conspirators' revenue. If the conspirators just gave away the fruits of their efforts, the heir would still collect, retaining any legal or other services he or she needed to collect.

Similarly, defendants wrongly contend that their agreement has a "significant pro-competitive effect" because without it they would be forced to compete, would secure lower profits, and thus would be unable to research lower-value estates. A183-A184. But the Supreme Court has long held that "[t]he elimination of so-called competitive evils is no legal justification" for per se illegal conduct. *Socony-Vacuum*, 310 U.S. at 220. The Sherman Act rests on "[t]he assumption that competition is the best method of allocating resources in a free market[, which]

recognizes that all elements of a bargain . . . are favorably affected by the free opportunity to select among alternative offers." *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978). This "statutory policy precludes inquiry into the question whether competition is good or bad." *Id.* at 695. Defendants' claims of efficiency ultimately boil down to concerns that competition will drive down their contingency fees. But low prices benefit consumers, and any "loss of profits to . . . competitors" that "result[s] only from continued competition" is "not of concern under the antitrust laws." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 115 (1986).

2. The district court mistakenly relied on *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 187-90 (7th Cir. 1985), in support of its claim that the "potential for increased efficiency supports application of the rule of reason instead of the *per se* standard." A135. *Polk Brothers* involves application of the ancillary restraints doctrine, in which an otherwise per se unlawful agreement that is ancillary to a legitimate joint venture is analyzed under the rule of reason. That doctrine has no application here because the indictment charges a standalone customer allocation agreement.

In *Polk Brothers*, a retailer of appliances and home furnishings and a retailer of building materials and lumber agreed to build a single building and parking lot for their two stores. 776 F.2d at 187. In connection with their agreement to build and maintain the facility jointly, the two retailers agreed not compete in each other's core product lines. *Id.* The Seventh Circuit held that because the agreement not to compete was "an integral part" of productive cooperation to build the stores—the parties would not have cooperated without protection from competition from each other—the agreement should be evaluated under the rule of reason. *Id.* at 190. In doing so, the court distinguished such "ancillary" restraints that are "part of a larger endeavor whose success they promote," from "naked" restraints that do "nothing but suppress competition." *Id.* at 188-89. *See also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.) (A customer allocation agreement is ancillary only if it is "subordinate and collateral to a separate, legitimate transaction" and reasonably necessary to make that separate transaction "more effective [or efficient] in accomplishing its purpose.").

The district court did not identify any legitimate collaboration to which the charged allocation agreement could have been ancillary, and defendants' claim below that their allocation agreement enabled them to work together and "limit the expenditure of resources," A182, is not credible; nor is it found in the indictment's factual allegations. Most of the resources to identify and evaluate estates and to locate the heirs are spent before defendants and their co-conspirators contact the heirs, before they know they will be in competition with each other, and before the customer is allocated under the agreement. To the extent that defendants want to pool resources with their competitors to administer the estates after the heirs are signed, that can be done without eliminating competition.

That is not to say that the defendants did not coordinate their efforts in any way. By definition, any conspiracy to eliminate competition will involve sufficient coordination between competitors to carry out the conspiracy. For example, in this case, the competitors needed to work together to develop a method for dividing the spoils of their conspiracy and then again when carrying out that portion of the agreement. A19. But parties to a per se unlawful conspiracy cannot

avoid the per se rule by styling their conspiracy as a joint venture if the purpose and effect of that venture is to eliminate competition.[13] *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled."), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 336 (2d Cir. 2008) (Sotomayor, J., concurring).

More fundamentally, the indictment does not charge an allocation agreement ancillary to some productive joint venture. Instead, the indictment charges a naked agreement to "suppress and eliminate

[13] Relatedly, *In re Sulfuric Acid Antitrust Litigation*, 703 F.3d 1004, 1013 (7th Cir. 2012), provides no basis for the district court's departure from the per se rule, A135. That case involved a claim of price fixing lodged against a "legitimate" joint venture that "enabled substantial economies in transportation and marketing" and led to price decreases for customers. 703 F.3d at 1011-13. The indictment contains nothing to suggest that there was a legitimate joint venture.

competition by agreeing to allocate customers of Heir Location Services sold in the United States." A18. At trial, the jury will be asked to decide whether the evidence proves beyond a reasonable doubt that the charged agreement existed and that defendants knowingly joined it. If the jury finds instead that the evidence proves something else—e.g., an agreement to engage in a legitimate joint venture to which the assignment of heirs was subordinate and collateral—then the jury must acquit because that is not the conspiracy charged in the indictment. *Cf. United States v. Green*, 592 F.3d 1057, 1068-69 (9th Cir. 2010) (affirming conviction under per se rule because evidence "was sufficient to support the jury's finding that [defendant] engaged in bid rigging," rather than merely organizing "legitimate teaming agreements" as defendant claimed).

Whether the evidence will prove the charged conspiracy goes to the ultimate merits. The district court may not supply its own answer to that question in response to a pre-trial motion. As this Court explained in *United States v. Pope*, Rule 12 does not permit a district court to decide in advance of trial questions that are relevant to guilt or innocence. 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.) (citing

Fed. R. Crim. P. 12(b)(2)). Pre-trial decisions going to the ultimate merits "disserve[] judicial economy" and "risk trespassing on territory reserved to the jury as the ultimate finder of fact." *Id.* That risk is particularly acute where a pre-trial ruling is based on evidence outside the indictment. *Id.* Here, defendants in their motion made claims based on their "ongoing" data analysis and the documents submitted under seal purportedly showing the "efficiency-enhancing" potential of their customer allocation agreement. A163, A183-A186, A213-A217 & A226-A229, A260. To be sure, the district court stated that it "would reach the same result based solely on the conduct as it is described in the indictment,"[14] A135, but the district court tellingly did not cite the indictment in support of its conclusion. In any event, the assertion is

[14] The district court wrongly claimed that the government "never disputed" that the court could consider the written agreement attached to the defendants' motion. A135. The government disputed the consideration of factual material at every turn: in its opposition to the original motion, A239 & A250, at oral argument, A56-A57 ("The government objects to any consideration of factual material outside of the indictment at this phase . . . including the guidelines agreement."), and in its reconsideration motion, A97-A98. In any event, nothing in the written agreement indicates joint productive activity akin to the "larger endeavor" in *Polk Brothers*, let alone that the customer allocation was necessary to such an endeavor.

belied by the indictment, which contains no statements supporting the district court's conclusion.

In sum, the indictment charges that defendants conspired to eliminate competition by allocating customers—conduct that this Court and the Supreme Court have held is per se unlawful. The government should be permitted to proceed to trial on that charge.

D. Section 3731 Provides Jurisdiction to Review the Rule of Reason Order, and If It Does Not, this Court Should Issue a Writ of Mandamus Correcting the Order's Profound Departure from Governing Law

1. The District Court's Rule of Reason Order Is an Effective Dismissal Appealable Under Section 3731

This Court has appellate jurisdiction over the Rule of Reason Order under 18 U.S.C. § 3731 because that Order effectively dismissed the indictment. In relevant part, Section 3731 authorizes the government in a criminal case to appeal "a decision, judgment, or order of a district court dismissing an indictment . . . as to any one or more counts, or any part thereof" except "where the double jeopardy clause of the United States Constitution prohibits further prosecution." *Id*. Congress specified that this provision "shall be liberally construed to effectuate its purposes," *id.*, and the Supreme Court has repeatedly said

that Section 3731 reflects Congress's intent "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337 (1975); *see United States v. Scott*, 437 U.S. 82, 84-87 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977). Thus, "government appeals are not restricted to the specific categories set forth in 18 U.S.C. § 3731." *United States v. Prescon Corp.*, 695 F.2d 1236, 1241 (10th Cir. 1982).

This Court has recognized that an order is appealable under Section 3731 if it is "tantamount to" a dismissal of an indictment or one or more counts, even if it does "not formally 'dismiss' an indictment or happen to be labeled that way." *United States v. Bergman*, 746 F.3d 1128, 1131 (10th Cir. 2014); *see also United States v. Williams*, 449 F.3d 635, 643 (5th Cir. 2006) (explaining that a "district court judge cannot circumvent the government's right to appeal under § 3731 by taking action that has the effect of a dismissal yet never actually entering a 'decision, judgment, or order.'"). Under this test, jurisdiction is assessed by "examin[ing] the consequences of the ruling by the district court, unbounded by the label given it." *Id.*

The government brought this case solely under the per se rule.[15] In this case (and all Sherman Act cases for the past several decades), the government has exercised its prosecutorial discretion to limit criminal antitrust prosecutions to conduct that clearly violates the per se rule.[16] This sound policy exists to provide "clear, predictable boundaries for business" and businesspeople between conduct that is potentially subject to the severe sanctions that accompany criminal conviction and conduct that is subject only to civil equitable relief.[17]

There can be no dispute that a plaintiff can bring a Sherman Act case under the per se rule and elect not to pursue a claim under the rule of reason. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 317 (3d Cir. 2010). And the decision of "what charge to file or bring before a

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[15] The government disavowed any rule of reason theory before the district court. A249 (informing the district court that the government has "long eschewed prosecuting conduct subject to the rule of reason, and it has no interest in doing so here").

[16] U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual, at III-12 (5th ed. 2017), *available at* https://www.justice.gov/atr/file/761166/download.

[17] Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Enforcement of Antitrust Laws: The U.S. Model (Sept. 25, 2006), *available at* https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model.

grand jury, generally rests entirely in [the prosecutor's] discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Thus, the clear and immediate consequence of the district court's decision to bar the government from proceeding on a per se theory is that the indictment is effectively dismissed (not, as the district court thought, that the government must instead proceed under a previously disavowed theory). *Cf. Ins. Brokerage Antitrust Litig.*, 618 F.3d at 317 (noting that where plaintiff pleads conduct not governed by the rule of reason and fails to plead facts necessary to state a claim under the rule of reason, the claim will be dismissed); *Polk Bros.*, 776 F.2d at 191.

Even if the government could or would proceed on a rule of reason theory, the per se rule provides a discrete theory of liability, and a pre-trial order that precludes the government from arguing a discrete theory of liability is tantamount to a dismissal, thus making it appealable under Section 3731. *See United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998), *abrogated on other grounds*, *Skilling v. United States*, 561 U.S. 358 (2010);[18] *see also United States v. Levasseur*, 846

[18] In *United States v. Bloom*, the government charged a single fraudulent scheme to deprive the victim city of "revenues" and "honest services." 149 F.3d at 651. When the district court dismissed the count

F.2d 786, 790 (1st Cir. 1988); *United States v. Oakar*, 111 F.3d 146, 150 (D.C. Cir. 1997).

The fact that the district court did not "formally 'dismiss'" the indictment does not render its order any less of a dismissal under Section 3731. *Bergman*, 746 F.3d at 1131; *Williams*, 449 F.3d at 643. When its clear implication is understood, it is apparent the Rule of Reason Order dismissed the indictment in its entirety, and the district court simply failed to recognize the consequence of its decision. *Bergman*, 746 F.3d at 1131. At a minimum, the Rule of Reason Order dismissed a discrete theory of liability, and such a decision is appealable under Section 3731, as well. *Levasseur*, 846 F.2d at 790; *Bloom*, 149 F.3d at 653-54.

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to the extent it was based on deprivation of honest services, the Seventh Circuit took jurisdiction over the appeal, because the honest-services theory provided a "discrete basis for the imposition of criminal liability." *Id.* at 654. Like the order in *Bloom*, the district court's Rule of Reason Order bars the government from proceeding on a "discrete basis for liability."

2. Alternatively, the All Writs Act Provides this Court Authority to Issue a Writ of Mandamus Correcting the Lower Court's Departure from Well-Established Law

If this Court concludes that Section 3731 does not provide appellate jurisdiction over the Rule of Reason Order, the United States respectfully requests that the Court construe the pertinent parts of this brief as a petition for a writ of mandamus and issue the writ under the authority provided by the All Writs Act, 28 U.S.C. § 1651.[19] The writ should direct the district court to recognize that the charged customer allocation agreement, if proved at trial, is subject to the per se rule, and

[19] In relevant part, Section 1651(a) provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Concurrent with the filing of this brief in this Court, the government is providing a copy to the district court in compliance with Fed. R. App. P. 21(a)(1). Courts of appeals routinely entertain requests to construe opening briefs as mandamus petitions in the event that Section 3731 does not provide jurisdiction for appeal. *See, e.g.*, *United States v. Farnsworth*, 456 F.3d 394, 396 (3d Cir. 2006); *United States v. Cote*, 51 F.3d 178, 180-81 & n.1 (9th Cir. 1995); *In re United States*, 900 F.2d 800, 802-03 (5th Cir. 1990); *United States v. Kane*, 646 F.2d 4, 5 (1st Cir. 1981); *United States v. Hetrick*, 644 F.2d 752 (9th Cir. 1980); *see also, e.g.*, Brief for Appellant United States of America, *United States v. Farnsworth*, 456 F.3d 394 (No. 06-1425), 2006 WL 6221237 (raising Section 3731 jurisdiction and mandamus together as alternatives in the opening brief); Brief for the United States at 6-11, *United States v. Cote*, 51 F.3d 178 (No. 93-30411), 1994 WL 16122500, at *6-11 (same).

further direct the district court to conduct all future proceedings consistent with that understanding. The issue is so fundamental, the error so glaring, and the opportunity for review so elusive that an uncommon remedy is, under these circumstances, both warranted and necessary.

To be sure, a writ of mandamus "is to be invoked only in extraordinary circumstances," *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009), such as "'when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court,'" *In re United States*, 397 F.3d 274, 282 (5th Cir. 2005) (per curiam) (quoting *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992)).[20] The Supreme Court has identified three criteria for

[20] The Court in *United States v. McVeigh* concluded that Section 3731 did not authorize an appeal from a pre-trial witness sequestration order and declined to exercise its mandamus authority, observing that it "may not be used to circumvent the policies effectuated by the restrictive provisions of § 3731." 106 F.3d 325, 333 (10th Cir. 1997) (per curiam). The Court, however, repeatedly emphasized in *McVeigh* that it did not "categorically rule out the possibility of mandamus relief" even in the context of "procedural orders." *Id.* at 328, 333. And, in fact, the Court has cited *McVeigh* in support of granting mandamus directed at a substantive ruling in circumstances like those here. *See infra* pp. 54.

issuing the writ: 1) "the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires"; 2) the petitioner's "right to issuance of the writ is clear and indisputable"; and 3) "the issuing court, in the exercise of its discretion," is "satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). All are met here.

First, if the Court concludes that Section 3731 does not apply, the United States has no other means to obtain relief. The order will "significantly influence how the case is tried" by expanding the government's burden beyond what the law requires, permitting evidence and argument on defenses the law forbids, and instructing the jury on a rule that does not apply. *In re United States*, 578 F.3d 1195, 1199 (10th Cir. 2009) (unpublished).[21] And yet, if Section 3731 is inapplicable, the government has no avenue of relief other than mandamus. *Id.* (citing *McVeigh*, 106 F.3d at 330; *United States v.*

[21] This Court's order granting a writ of mandamus in *In re United States* was unpublished, but it nevertheless appears in the Federal Reporter as an appendix to an opinion dissenting from it. For the Court's convenience, this brief cites the order as it appears in the Federal Reporter.

Wexler, 31 F.3d 117, 128 (3d Cir. 1994); *In re United States*, 397 F.3d 274 (5th Cir. 2005)). The government sought reconsideration in the district court, but reconsideration was denied. *See Wexler*, 31 F.3d at 128. If the defendant were acquitted under the rule of reason, the Double Jeopardy Clause would bar a government appeal; and if the defendant were found guilty under the rule of reason, the government would have no basis for appeal. *See In re United States*, 578 F.3d at 1199; *In re United States*, 397 F.3d at 283. Moreover, the ruling will effectively foreclose any trial whatsoever. The government has already renounced any intention of trying the case under a rule of reason theory, so the district court's ruling is the case's practical terminus. Thus, if Section 3731 does not apply, mandamus is the only route to correcting a grave error about the law governing this case.

Second, there is a "clear and indisputable" reason for this Court to intervene because the district court's Rule of Reason Order transparently contravenes multiple binding and longstanding precedents from this Circuit and the Supreme Court, *see supra* Part III. *See United States v. Higdon*, 638 F.3d 233, 245-47 (3d Cir. 2011) (issuing the writ because the lower "court's insistence on giving an

improper jury charge constitutes 'clear and indisputable' error") (quoting *Cheney*, 542 U.S. at 381). Disregarding controlling precedents and invading the prerogatives of the prosecution by choosing the theory of the case for them is why the order "represents [not just] clear legal error [but] also . . . a clear abuse of discretion." *In re United States*, 397 F.3d at 285.

Third, issuing the writ is appropriate to prevent the district court from adjudicating this criminal case based on a fundamental and clear misunderstanding of governing law. *See In re United States*, 578 F.3d at 1199-200 (issuing writ to prevent jury instruction on an impermissible defense); *United States v. Higdon*, 638 F.3d at 245-47 (issuing writ to ensure proper jury instruction on elements of an offense); *Wexler*, 31 F.3d at 121, 128 (issuing writ correcting erroneous jury instruction on "genuine indebtedness" which government claimed made certain criminal tax cases more difficult to prosecute and rendered it unable to proceed to trial).

As the court in *Wexler* explained, "the adoption of a clearly erroneous jury instruction that entails a high probability of failure of a prosecution—a failure the government could not then seek to remedy by

appeal or otherwise—constitutes the kind of extraordinary situation in which we are empowered to issue the writ of mandamus." 31 F.3d at 128. Here, not only is the entire architecture of the jury charge at issue, but so are innumerable evidentiary and other considerations that would not only significantly impact a trial, but also would likely scuttle the entire prosecution.

Accordingly, if Section 3731 does not provide jurisdiction for this appeal, then it is entirely appropriate, indeed essential, for this Court to use its mandamus authority to remedy this extraordinary situation and permit this case to proceed under the clear and controlling law of this Court and the Supreme Court.

CONCLUSION

This Court should reverse the order that the indictment is barred by the statute of limitations; reverse the order that the case is subject to the rule of reason or, alternatively, issue a writ of mandamus directing the district court to apply the per se rule; and remand for trial.

STATEMENT REGARDING ORAL ARGUMENT

This case presents issues that could have significant implications for the criminal enforcement of federal antitrust law, and oral argument would materially assist the Court in resolving those issues. For these reasons, the government respectfully requests oral argument in this case.

Respectfully submitted.

s/ Jonathan Lasken

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January 3, 2018

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,822 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 with 14-point New Century Schoolbook font.

January 3, 2018

s/ Jonathan Lasken
Attorney for the
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

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January 3, 2018

s/ Jonathan Lasken
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CERTIFICATE OF SERVICE

I, Jonathan Lasken, hereby certify that on January 3, 2018, I electronically filed the foregoing Opening Brief for the United States of America (Corrected) with the Clerk of the Court of the United States Court of Appeals for the Tenth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 3, 2018

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United States of America

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX Defendants.	Case No. 2:16-cr-00403-DS ORDER ON DEFENSE MOTION REGARDING APPLICATION OF RULE OF REASON U.S. District Court Judge David Sam Magistrate Judge Brooke C. Wells

WHEREAS, on August 17, 2016, the defendants were charged by way of Indictment with one count of violating the Sherman Act, 15 U.S.C. § 1;

WHEREAS, the defendants moved on March 31, 2017 for an order that this case be subject to the rule of reason for purposes of assessing the legality of the charged conduct under the Sherman Act;[1]

WHEREAS, the government submitted its opposition to the motion on April 28, 2017;

WHEREAS, the defendants submitted their reply on May 12, 2017;

WHEREAS, the Court heard oral argument on the motion on June 21, 2017, at the conclusion of which the Court ruled orally this case is subject to the rule of reason,

The Court hereby makings the following findings:

1. In Sherman Act cases, the rule of reason presumptively applies. *See Texaco Inc. v.*

[1] The defendants' motion further requested an order that the Indictment be dismissed because a rule of reason prosecution does not meet constitutional vagueness standards or, in the alternative, because the statute of limitations bars this prosecution. The Court has not yet ruled on those issues, and they are not addressed in this Order.

Dagher, 547 U.S. 1, 5 (2006). *Per se* liability applies only where the practice fits a *per* se category established by prior precedent, or on its face appears to be one that would always restrict competition and decrease output. *See Cayman Exploration Corp. v. Utd. Gas Pipe Line Co.*, 873 F.2d 1357, 1360 (10th Cir. 1989); *see also Dagher*, 547 U.S. at 5. "The *per se* rule's conclusive presumption that the restraint is unreasonable should not be applied to a challenged practice until 'experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" *Cayman Exploration*, 873 F.2d at 1360 (*quoting Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982)).

2. In the Indictment, the government characterizes the defendants' conduct as customer allocation, Dkt. 1 ¶¶ 9-10, which has previously been recognized in certain circumstances as a *per se* violation, including by the Tenth Circuit, *see United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 472 (10th Cir. 1990). The Court may not rely on labels applied by the government, however, and must instead analyze the substance of the allegations to determine whether the challenged conduct constitutes customer allocation in a form that has been treated by the courts as a *per se* violation. *See Cayman Exploration*, 873 F.2d at 1360; *see also Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1083-84 (11th Cir. 2016); *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014); *In re Sulfuric Acid*, 703 F.2d 1004 (7th Cir. 2012); *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137 (9th Cir. 2011) (en banc); *Polk Bros. Inc. v. Forest City Enters.*, 776 F.2d 185, 187-90 (7th Cir. 1985).

3. The main forms of customer allocation recognized by prior precedent are geographic and existing-customer allocations. But the agreement charged in the Indictment (set forth in a written agreement titled the "Guidelines")[2] does not resemble either of those, and in

[2] The written agreement, called the "Guidelines," documenting the charged conduct was submitted by the defendants' with their motion. The Court may properly consider that document

particular it does not resemble the existing-customer allocation at issue in *Suntar Roofing*. Among other things, the Guidelines were structured in an unusual way, affected a small number of estates, and occurred in a relatively obscure industry (heir location services) with an unusual manner of operation. The government has not identified, and the Court is not aware of, any case addressing the particular kind of restraint at issue here, or otherwise closely resembling this one. *See Cayman Exploration*, 873 F.2d at 1360; *Procaps*, 845 F.3d at 1084. The Court therefore cannot predict with any confidence, and does not believe, that the Guidelines operated as a classic customer allocation. *See In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014).

4. Indeed, unlike other customer allocations, the Guidelines on their face would not necessarily restrict competition or decrease output, but instead contained efficiency-enhancing potential. The Guidelines applied only where two firms had already invested significant resources investigating the same estate. The Guidelines provided for the firms to integrate their efforts going forward, specifically in administering the probate process of the estate, which needed to be done only once. The potential for increased efficiency supports application of the rule of reason instead of the *per se* standard. *See Sulfuric Acid*, 703 F.3d at 1013; *Polk Bros.*, 776 F.2d at 187-90.

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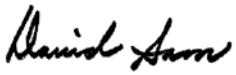
at this stage because it forms the basis of the government's allegations, *see, e.g.*, *Borde v. Bd. of Comm'rs*, 514 F. App'x 795, 799 (10th Cir. 2013), and because the government never disputed as much, *see United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994); *United States v. Brown*, 925 F.2d 1301 (10th Cir. 1991). Nevertheless, the Court can and would reach the same result based solely on the conduct as it is described in the Indictment.

Based on the foregoing findings, it is hereby ORDERED that this case is subject to the rule of reason for purposes of determining whether the conduct charged in the Indictment violates the Sherman Act.

Dated this 28th day of August, 2017.

BY THE COURT:



Judge David Sam
United States District Court Judge

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* *

UNITED STATES OF AMERICA,	)	Case No. 2:16CR403 DS
	)	
	)	
vs.	)	MEMORANDUM DECISION
	)	AND ORDER
KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX	)	
	)	
	)	
Defendants.	)	
	)	

* *

I. INTRODUCTION

The Defendants in this case, Kemp & Associates, Inc. and its vice-president and part owner Daniel J. Mannix, were indicted on August 17, 2016 on a single-count conspiracy to violate the Sherman Act, 15 U.S.C. § 1, by engaging in customer allocation pursuant to a detailed, written agreement that was not concealed and that terminated in 2008. The agreement at issue is a set of guidelines which governed the joint activity between Defendants and Blake and Blake ("the Guidelines"). Defendants filed a Motion for Order that the Case be Subject to the Rule of Reason and to Dismiss the Indictment on March 31, 2017. The parties appeared before the Court on June 21, 2017 for oral arguments on Defendants' Motion for Order that the Case be Subject to the Rule of Reason and to Dismiss the Indictment. The Court found that the rule of reason governs this case and directed the Defendants to file a proposed order in accordance with the Court's ruling. The Court did not rule on the statute of limitations issue.

The defendants submitted a proposed order for the Court's signature on June 30, 2017. The government filed a Motion to Reconsider Oral Ruling, Objection to Defendants' Proposed Order and Request for a Ruling On Defendants' Motion to Dismiss on July 14, 2017 alleging that the Court's holding applying the rule of reason to the charged agreement is clear error. Both parties are also requesting that the Court rule on the statute of limitations issue which Defendants raised in their Motion.

II. ANALYSIS

A. Reconsideration

The government is requesting that the Court reconsider its ruling made after oral argument on June 21, 2017. Because the government offers no facts or law which would suggest to the court that its earlier decision was erroneous, the motion to reconsider is denied and the Court affirms its ruling based on reasoning given at the hearing on June 21st and in its ORDER ON DEFENSE MOTION REGARDING APPLICATION OF RULE OF REASON.

B. Statute of Limitations

Both parties are requesting that the Court issue a ruling on the statute of limitations issue raised in Defendants' Motion to Dismiss dated March 31, 2017. Defendants are asking that the Court dismiss the Indictment because it is time-barred. Statutes of limitation provide protections to a defendant's right to a fair trial as over time it becomes difficult or impossible for defendants and prosecutors to present a complete and fair trial when evidence may become available or recollections fail. Additionally, limitations exist to ensure the government does not unreasonably delay in bringing a case.

"[T]he applicable statute of limitation…is…the primary guarantee against bringing overly stale criminal charges." *United States v. Marion*, 404 U.S. 307, 322 (1971) (citing *United States v. Ewell*, 383 U.S. 116, 122 (1966)). "Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defence.'" *Id.* (citing *Pub. Schs v. Walker*, 76 U.S. 282, 288 (1870)). Given the fundamental protections they provide, "criminal statutes of limitation are to be 'liberally interpreted in favor of repose.'" *United States v. Habig*, 390 U.S. 222, 227 (1968) (quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932)).

The Indictment in this case alleges a single conspiracy to violate Section One of the Sherman Act in that the Defendants entered into a conspiracy with Richard A. Blake Jr. and others "to suppress and eliminate competition by agreeing to allocate customers of the Heir Location Services sold in the United States." Indictment ¶ 9. The Indictment makes plain that the conspiracy charged is the allocation of customers between two competitors, Kemp & Associates and Blake & Blake and states that "the substantial terms of [the conspiracy] were to allocate customers of Heir Location Services sold in the United States." Indictment ¶ 10.

The limitations period for a conspiracy to violate the antitrust laws is five years. 18 U.S.C. § 3282(a). The Guidelines agreement between Kemp & Associates and Blake and Blake ended in July 2008. After that time, no additional estates became subject to the Guidelines and there was no further allegedly wrongful allocation of customers. Thus, the alleged conduct in furtherance of the criminal purpose of the conspiracy ended more than eight years before the filing of the Indictment in this case.

As to whether the statute of limitations bars prosecution in this case, "the crucial question . . . is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *Grunewald v. United States*, 353 U.S. 391, 397 (1957). The Court is bound by the language of the Indictment when determining the scope of the alleged conspiracy. *See United States v. Qayyum*, 451 F.3d 1214, 1218-19 (10th Cir. 2006). The scope of the alleged conspiracy as defined in the indictment is "to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services sold in the United States." It then follows that any conspiratorial agreement ceased to exist once the allocation of customers through the Guidelines ceased. Once the firms agreed to end the Guidelines, only routine, administrative consequences of a concluded allocation agreement remained, and nothing more was done with respect to that estate that served the purpose of "suppressing" or "eliminating" competition between the two.

In regard to a conspiracy to violate the Sherman Act, it exists only for so long as its members continue to commit acts in furtherance of the agreement that tend to suppress or restrain competition. *United States v. Inryco*, 642 F.2d 290, 293 (9th Cir. 1981) ("While a Sherman Act conspiracy is technically ripe when the agreement to restrain competition is formed, it remains actionable until its purpose has been achieved or abandoned and the statute of limitations does not run so long as the co-conspirators engage in overt acts designed to accomplish its objectives."). Here, the purpose of the alleged conspiracy had been abandoned in July 2008 when the Guidelines were terminated and all that remained were administrative issues related to resolving the estates and payments resulting therefrom.

The government argues that another object of the conspiracy was economic enrichment and that the receipt or distribution of any proceeds from the administration of estates that were subject to the Guidelines, represents conduct in furtherance of the conspiracy and makes the charge timely. However, this theory confuses the results of a conspiracy with actual conduct in furtherance of it. A conspiracy's statute of limitations should not be extended 'indefinitely beyond the period when the unique threats to society posed by a conspiracy are present." *United States v. Doherty*, 867 F.2d 47, 62 (1st Cir. 1989). Here the "unique threat" identified in the indictment is the alleged customer allocation underlying the only charge in the case and that threat ended with the termination of the Guidelines in July 2008. Therefore, this case can be distinguished from cases cited by the government such as *United States v. Morgan*, 748 F.3d 1024 (10th Cir. 2014) and *United States v. Evans & Associates Construction Co.*, 839 F.2d 656 (10th Cir. 1988).

In *Evans*, the "Sherman Act violation was 'accomplished both by the submission of noncompetititve bids and by the request for and receipt of payments at anti-competitive levels.'" *Id*. at 661. The *Morgan* case was a kidnapping and robbery case where the evidence showed that "the central purpose of [the] kidnapping and robbing [] was to obtain money and divide it among the co-conspirators," and statements regarding the distribution of proceeds "were made in the course of and in furtherance of the conspiracy." 748 F.3d at 1036-37. These cases are distinguishable in that the evidence in *Evans* and *Morgan* shows that the central purpose of the conspiracy was to obtain wrongful proceeds or money.

While the Indictment here mentions the payment of proceeds, Ind. ¶¶ 11 (h), (i), the central purpose of the conspiracy charged was not "economic enrichment." Administering

estates bore no relation to customer allocation - the threat claimed to be the purpose of the conspiracy. Additionally, the government has identified 269 allegedly affected estates, the administration of which consisted of a series of ordinary, non-criminal events that could last many years. In contrast, *Evans* involved the bid for one contract which was bid, granted, completed and fully paid within the two years. *See Evans*, 839 F.2d at 657, 660-61.

The alleged conspiracy here was to allocate heirs, and the Guidelines were terminated by Mannix in July 2008. After termination of the Guidelines, certain administration work, including the recovery of monies for heirs and the payment of the firms themselves, continued into the five-year period prior to the Indictment. Because of the length of time it may take to complete full administration of an estate, the theory that this extends the conspiracy into the statute of limitations period would create a significant arbitrariness regarding the length of the limitations period. This period could change based on factors unique to each estate such as number of heirs, the jurisdiction of the estate, the speed the lawyers handle the matter, and others. This arbitrariness is not consistent with the very reasons limitations periods exist in criminal cases. Therefore, this court finds that the conspiracy ended with the termination of the Guidelines in July 2008 and the case is dismissed.

III. CONCLUSION

For the foregoing reasons Defendants Motion for Order that the Case be Subject to the Rule of Reason and to Dismiss the Indictment is granted and the case is dismissed as barred by the statute of limitations.

SO ORDERED.

DATED this 28th day of August, 2017.

BY THE COURT:

DAVID SAM
SENIOR JUDGE
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2:16-CR-403DS
	)	
KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX,	)	
	)	
Defendants.	)	
	)	
_____	)	

BEFORE THE HONORABLE DAVID SAM

June 21, 2017

Motions Hearing

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Salt Lake City, Utah, June 21, 2017

(10:02 a.m.)

THE COURT: Good morning counsel and others who are present for this hearing. The court welcomes you here this morning.

We are here to address case number 2:16-CR-403, *United States of America versus Kemp & Associates and others*. And counsel, at counsel table, I believe the last time we had Ms. Tulley, is that right?

MS. TULLEY: Yes, Your Honor.

THE COURT: And you have with you -- who do you have with you at counsel table?

MS. TULLEY: Your Honor, this is Molly Kelley, she is going to be arguing for the government, and also with me is Robert Jacobs and Ruben Martinez.

THE COURT: All right, very well. Thank you, counsel. And for the defendants, we have -- I think Jason Boren was here last time.

MR. BOREN: Good morning, Your Honor. Yes, today we have Richard Albert at counsel table along with Devin Cain. We also have Mr. Mannix sitting at the front table.

THE COURT: Yes. Mr. Mannix, the court welcomes you as well.

MR. BOREN: At the back table we have counsel for Kemp & Associates. We have Jim Mitchell and Michael Grudberg.

MR. GRUDBERG: Good morning, Judge.

THE COURT: All right, very well. And Mr. Cain is going to be arguing; is that right?

MR. ALBERT: Your Honor, I'm, with the court's permission, I'm going to be arguing the Rule of Reason argument and with the court's permission Mr. Mitchell will be arguing the statute of limitations piece for the defendants.

THE COURT: All right, very well. My notes do reflect that we have one motion in abeyance and we have the motion today to the Rule of Reason, whether the case is subject to the Rule of Reason or the per se rule, right?

MR. ALBERT: Yes, Your Honor.

THE COURT: And this is the defendant's motion. Do you have an estimate, counsel? I would like an estimate of your time.

MR. ALBERT: Um, Your Honor, I think my piece might go around a half hour. I think Mr. Mitchell's piece around --

MR. MITCHELL: 10 to 15 minutes, judge.

THE COURT: So a total, a maximum 45 minutes; is that correct?

MR. ALBERT: Yes, Your Honor. We would like to reserve, obviously, some time to respond to whatever the government has.

THE COURT: For the government?

MS. KELLEY: Your Honor, I don't expect to exceed 15 minutes.

THE COURT: All right, 15 minutes, very well. All right counsel, um, we will look forward to hearing your argument.

MR. ALBERT: Thank you, Your Honor. Your Honor, um, one of our central points is that just putting a label on a particular conduct, customer allocation, that doesn't end the discussion that starts the discussion. Because the case law in this area, and they're mostly civil cases, of course, but it is the exact same statute, it's the Sherman Act and it is the exact same case law doctrine. The cases are pretty much all about one party labeling certain conduct so that it seems at first blush to fit into a per se box. They use the label price-fixing or customer allocation and market allocation, and there are a multitude of cases, and we cite a number of them in our papers, that shows what the court must do then is look behind and make its own determination as to whether the conduct actually fits in those very narrowly defined per se category, or whether it falls under the general rule of the Sherman Act the Rule of Reason. There is a number of cases that we cite where the courts -- I mean essentially the cases are really all about looking past the label and saying is it right or not.

The Tenth Circuit case, *Cayman Exploration Corp,* that

is labeled price-fixing, customer allocation cases Page 17 and 18 and 22 through 25 of our main brief. There is the *Wholesale Grocery Products* case and the Eighth Circuit *Sulfuric Acid,* which we'll be talking about, *Harris V Safeway*, which is a Ninth Circuit en banc, *Polk Brothers,* another one from the Seventh Circuit that is particularly useful. *Procaps* major which is a District of Columbia case. And what you see when you -- when you look at those cases and you study the area is that for customer allocation the authorities and I would say the Areeda & Hovenkamp treatise is also very helpful and cited regularly by the Supreme Court, but the authorities recognize two classic case types of customer allocations that have been held to fall into the per se category. Geographic allocation, where somebody says I will take Kansas, you take Nebraska, and existing customer allocations. I have this customer, you know, I am servicing these businesses, you're servicing those, don't raid mine. Those are the -- those are the cases. Those are the classic cases that fit in the per se category. This case is neither of those and it's not even close. It's an unusual agreement, we refer to it as the guidelines because that's actually the title on the document by which it was documented that applied in very limited circumstances in an unusual industry, heir location, and our main point is that the court has to look past the label. It's particularly

something that is appropriate in a case like this where there is a written agreement that you can actually look at and you have to analyze it in the context of the market and the industry at issue. And it's striking because the government in its papers, and maybe they will -- they will straighten this up when they speak, but they are saying you can't look at the agreement itself, you can't look past what we say in the indictment, and why its design is pro-efficiency and pro-competitive, and you can't look past the label now, and you can't do it at trial because no evidence regarding pro-efficiency aspects of the guidelines, no evidence regarding why the guidelines were reasonable, is admissible at trial. That's on Page 11 of the government's brief. And that's really directly contrary to what the decisions instruct in this area. Now I must tell you if the government's view on those points prevail and what we would have in this case would be a document -- the government would call one witness, a document custodian and ask is this a copy of the guidelines agreement? Yes, it is and it would be admitted, and then the court would instruct the jury that's a customer allocation agreement and we could all go home and Kemp would be convicted and Mr. Mannix could go directly to sentencing. That's not fair, it's not just, and it's not what the cases in this area teach as to how it is -- how this process is supposed to work. And the

government's argument on this is also striking because we have put facts forward and our motion analysis shows that not only is the pro-efficiency aspect of the guidelines apparent from its design, and I'm going to speak to that further in a few minutes, but, in fact, in the real world, the pro-efficiency impact actually happened because the data shows that Kemp was able to service a significantly greater portion -- proportion of small estates during the guidelines period and also that the guidelines had a de minimis, de minimis impact on price. And if we could have the charts, please.

Your Honor, this is, once we get it up on the screen, this is a chart that is in our papers in our main brief and it shows the blue line is the state -- the government's -- the states the government has listed in stills particulars as those impacted by the guidelines and the red line is all other states serviced by Kemp during the period. And if you look at the chart, you can see that the difference is de minimis and this is for the entire period or the period for which we have data that -- that the guidelines was in place. The difference is de minimis. It is .65 percent, it's negligible. And if we could have the next slide, please, we did it another way, um, where we looked at states -- that the blue line is states where -- where Kemp & Associates had -- where both Kemp and Blake & Blake operated, and the red

line is where Blake didn't operate but Kemp did. So that's a control group. And, again, if you look at it, um, you see that the difference in rates is negligible, it is .6 percent in this case, and this one also shows when the end of the agreement is in July of '08. So if you could take that down.

So, you know, preventing harmful price impact to customers is really, really what the antitrust laws are all about and assessing if an agreement helps productivity and efficiency is also what the antitrust law is all about. But the government is claiming that the court can't look at that and the jury can't look at that and that is striking. And Your Honor I just want to briefly speak a little bit about the heir location industry. We've laid it out in our papers but I think it just worth walking through a little bit because it is an unusual industry.

THE COURT: Yes, I don't think there is many companies that operate in this area, are there?

MR. ALBERT: There are not. There has been a handful over time, it's a sort of mom and pop industry, um, a lot of family run shops, um, originally started pretty local and then they expanded over time. But it's sort of a -- it's sort of an unusual industry and obviously the business of this -- of firms in this industry is to look for estates or individuals who died intestate so the estates would

typically escheat to the state and then locate the rightful heirs to those estates, if they can, through genealogical research, and then help the heirs recover their share of the estate in exchange for a percentage of the recovery most of the time for these estates the heirs really had no awareness of their relationships to the decedent so any money, any inheritance they get is really, you know, your quintessential found money. And finding estates is labor intensive. I mean the way the business works is the field reps are just driving from county courthouse to county courthouse. Of course now a days more records are electronic, but at the time of this case that really was not so much the case and it was just pounding the pavement.

Once the estate is located, there is a complicated evaluation process, a little bit more art than science but is the estate large enough to be able to solve -- to be able -- large enough and likely enough to be able to be solved that it justifies putting the resources in to do it. Obstacles to recovery, there are many of them. I mean one of them is very basic. But if you have somebody named Smith, it is almost -- it's very difficult. If you have a very, very common surname, it can be very difficult to do the -- to do the searching. Um, and the difficulty of the genealogical searching is actually what lead Kemp & Associates to be here in Salt Lake City. They moved here

from Florida to take advantage of the Family History Library here in Salt Lake City.

Obviously, the genealogical searching for the heirs is just part of it. There is a lot of additional work then to track down the heirs, and then, um, and, of course, the work that's done, which is all done before you ever approach the heir, all of that work is customized to that one estate. It's not like there is value to it for anything other than that one estate.

And then once the estate is, they use the phrase solved, the next phase is to approach the heirs and talk to them about work, offer to help them in claiming the inheritance in exchange for a percentage of the recovery. If they agree they sign a contract assigning their rights to Kemp or Blake and the company acts on their behalf in claiming the inheritance. And then after that is the final phase and it is an important phase we call it the administration phrase in our papers, sometimes referred to as the legal phase because lawyers are involved where the heir location firm engages counsel, prepares the factual material underlying the court filings, and other material that are needed for probate court, and then gets more information from the heirs, provides information to the heirs, and administers the distribution of the estate and payment of counsel and any vendors.

That last phase can go on for quite a while because some probate court move quite slowly and there is a lot of work. There are people at Kemp whose pretty much sole job is to handle that last phase.

Now, I would like to talk a little bit about the guidelines agreement itself. Um, I've talked a lot about it but it's worth a little tighter analysis of its language. If I could have the slide on that, please. Okay, so what this is -- both -- this is just highlighting some of the language from the indictment and the guidelines. These materials are in the papers before Your Honor. The guidelines are Exhibit B to my declaration. But -- so just looking at the -- on the right, the guidelines, the first paragraph, the very first sentence of the guideline says, if company A contacts an unsigned heir that has been hit by company B, then company A contacts company B and splits the case. That's kind of the main -- one of the main operative aspects of the guidelines basically, but it points out how narrow the guidelines are. It's only in the unusual -- only in the circumstance where both companies find themselves having invested the significant resources to find the estate, chase down the heirs, and then actually show up at one of the heirs that they are in that situation where they are duplicating each other's work. That is the only time that the guidelines can potentially kick in. It's very

different from any of the other -- that narrow application and being isolated to just situations where they're duplicating efforts. It is very different from the cases that are cited in the papers. And then there is that term below that is highlighted in blue that says that the company that was there first, which is company B, gets to keep the full value of the assignments that are in their hand or are dated prior to the date that company A calls. And that -- that clause which is not mentioned in the indictment, is an efficiency enhancing provision because -- because it maintains the incentive for both firms to race to get the best heirs first. That's where the competition really happens in racing to find -- doing the research and finding heirs and if you already have some in hand, those are not split. So that is an efficiency enhancing part of the -- of the guidelines.

Going to the next paragraph below, this just specifies that the process does -- is only initiated when one company contacts an unsigned heir that has been touched by the other company. And if that's not the situation, the contacted company is under no obligation to discuss the case. Again, the guidelines only come in when there is proof that they're working on that they've solved the same estate. And in this way, Your Honor, it's interesting but the guidelines are just kind of a variance of another agreement that is very

common in the heir location industry which is a correspondent agreement where because the firms were geographically diverse, sometimes in the old days, firms would have more resources on the ground in a particular area and they would find that oh, the heirs are located in Florida, Kemp is in Florida, I'm in Seattle, and so we will, you know, they will agree among themselves to split the work, split -- and split the estate.

And that often happens when you have the mother side on one -- in one location and the father side in the other. This agreement, the guidelines agreement, is just a variant on that correspondent coordination agreement which is very much like what we see certainly in New York we see a lot two plaintiff law firms coming together on the same case, um, a big class action case and they get together and they agree okay I will take this responsibility for discovery, you take that responsibility for pretrial and they split the fees. That is -- that is the -- and by the way, it is very public that heir location firms do this correspondent type relationship, it is even on the website of Blake & Blake. So the guidelines were just sort of a variance of that longstanding situation or way of organizing firms coordinating that nobody I'm not aware of anybody claiming was illegal or inappropriate.

If we could flip to the next slide, please. So I'm

going, just to move along, I'm going to go to the second paragraph which is paragraph four of the guidelines and, again, this is one of the key operative paragraphs of the guidelines. It says the split should be 55/45 with the attorney fees coming off the top. The company that does the signing and documenting gets the 55 percent share. The company that has more expenses and does more work gets paid more. This is a critical, you know, efficiency enhancing aspect of the guidelines and -- and it's just laying right out there that the companies doing more work should get paid more. And by the way, and when we speak about right in the guidelines where it says the signing and documenting, the signing and the documenting is what I call the administrative phase. It's the documenting of, you know, of getting the paperwork from the heirs and getting that into proper form for the probate court to -- to get paid out on the will. The guidelines are structured to encourage the firm to do more work and get the bigger share of the fee.

Finally, in the third scenario another efficiency enhancing aspect of the guidelines it has a separate rule for smaller estates. Smaller estates have higher risk, or at least equal risk but lower return because of the value. And so in order to encourage the firms to work on these smaller estates it increases the percentage. Again, an efficiency enhancing aspect of the guidelines and that is

borne out in the actual impact in the real world.

Finally, if we could have the last slide. Another sort of efficiency enhancing aspect of the guidelines not mentioned in the indictment but right there in black and white, and I'm going to focus on scenario B and C. Basically these scenarios show that the company that's there first, if that company finds superior heirs, not a cousin but say a niece or a nephew, then that company can reject the split, um, and there is -- or if only one company has superior heirs and the other one had inferior heirs, that the company can, with the superior heirs, can reject the split also. That's in paragraph B and C. And again, that is all toward encouraging the companies to do the best research and find the best heirs quickly.

So there is a lot of efficiency enhancing aspects written right into the language of the guidelines that are, you know, critically important for the court to consider.

Your Honor, I'm -- moving on from the guidelines I just want to speak briefly about Dan Mannix, he is my client. It's pretty obvious that the company is Kemp & Associates and his name isn't Kemp so he is one of the associates. At the time the guidelines agreement was entered into he had no ownership in the company, he wasn't an officer. The Kemp family owned the company, controlled it, and they still do.

At the time that the guidelines were entered into back in around 2000, Dan was director of operations of the company, but he was ousted from that position by Jeff Kemp in 2005, he was demoted, and he didn't really reassume any sort of leadership position in the company until 2007 when he became owner of a small minority share and director of operations again. And it was a few months after Mr. Mannix was given back authority in the company that he withdrew the company from the guidelines in 2008, July of 2008. Mr. Mitchell is going to speak more to that.

So Your Honor, and just Mr. Mannix is also one of the top high school LaCrosse coaches in the State of Utah, for what it's worth, which is actually quite a lot.

So why is the guidelines agreement properly analyzed under the Rule of Reason and not -- and not the per se rule? As we say in our papers, Rule of Reason is the general rule, per se only applies in specific circumstances. Particular cases that have been recognized overtime and I think the language I mean right out of the Tenth Circuit *Cayman Exploration* case says the per se rule should not be applied to a challenged practice until experience with a particular kind of restraint enables the court to predict with confidence that the Rule of Reason will condemn it. Unless the agreement falls squarely in the per se category, the Rule of Reason applies. That's a quote from the *Milk*

Antitrust case. There's many, many quotes in the cases that talk about how important it is to keep the per se rule in its place. You have to look at the agreement as a whole, and you have to conduct a detailed and case specific analysis in the context of the particular industry.

Now, we're not saying the government argues in their papers oh, the per se rule applies to all industries. Okay, it can, but -- but you can't -- you can't apply it. I mean if there were blatant price-fixing that would be a different story. But when you have a different kind of unusual kind of agreement in an unusual kind of industry, both of which you have here, you can't just stick it in per se in the per se category particularly in a criminal case. This is a criminal case.

Now, as we have said, the government claims customer allocation. It doesn't fit the two recognized classic cases, geographic or existing customers. We pointed out in our papers that we could not find any case that was condemned per se that looks like the guidelines. The government in its response also failed to identify any case that looks like the guidelines having that kind of unusual structure of an occasional when efficient joint service of clients and weighted profit sharing. The government is trying to squeeze this case into the template of the *Suntar Roofing* case. It doesn't fit. It's just very different

kind -- I mean *Suntar* is your classic existing customer allocation case, you know. You don't service my -- my construction companies for roofing, I won't service yours, we won't compete for them. That's it. This case is not near that.

So what are the unique aspects of the guidelines that make it -- take it out of the classic customer allocation agreement? I have said it, but let me just try to list it. The agreement sprung into effect only when it was efficient, only when the two heir location firms had both invested the significant resources to produce the same exact and unique product which is the information relating to the same estate. That's the only time the agreement sprung into effect. And it was efficient at that point for both firms to have one of them take the lead on the last phase of the process which is the administration phase. That's -- it's an unusual circumstance, they both have done it, and in that situation it's sufficient for one to take the lead rather than duplicating the efforts.

And as I have said, we said in our papers, this is a very limited group of estates. Two and a half to three and a half percent total of the total estates worked by Kemp during the relevant period. The guidelines, in addition, they entailed the firm's pooling resources, information regarding the identity and location of the heirs that they

have found. They pooled those resources and used it jointly to their mutual benefit and they also shared the risk of loss, because once they came together, and had one firm take the lead, if the case did not make it through to successful conclusion, they pooled the risk of loss. And that was -- that was a regular occurrence. Not, you know, because a will can show up, a superior heir can show up, and then they're both having invested all this money, they're out.

We point out in our reply brief how the government simply doesn't address these arguments. They ignore the administrative phase which we rely on repeatedly. And as I said, this phase is referenced right in the language of the guidelines agreement because it's the documenting phase.

Your Honor, I want to mention briefly there is another efficiency enhancing aspect of the guidelines, it's mentioned in our papers but we actually have found a new case on this that I want to mention.

THE COURT: Now, this case is not mentioned in your briefing?

MR. ALBERT: I'm about to mention a case that we have not mentioned, yes. We mentioned the efficiency enhancing aspect of the guidelines avoiding what we call blow ups. So this is another thing that makes this industry strange. Because the product is this information, and once it's revealed, in theory, somebody could go and seek -- seek

their inheritance on their own, or they could use somebody. So when both Blake & Blake and Kemp found themselves at an heir and they had done the work on the same estate and they found themselves, if one was angry and resentful and said well, if I'm not going to get it nobody is going to get it, they can reveal the information to the heir and there were incidents of that where basically when Blake & Blake believed it was not going to get the estate, was not going to get the heirs, they would -- they would give the contact information for the estate administrator right to the heir to let them go do it on their own. And that would -- now and often people thought they could get the estate and they wouldn't, it's basically heir location services are not going to be part of this when that -- when Blake & Blake did that. That's tortious conduct. That is tortious interference with prospective economic advantage, it's unfair competition, and it was something that Blake & Blake was engaging in that led to the entering into the guidelines in the first place. And the Sherman Act recognizes, and this is where the case comes in, the Sherman Act recognizes that responding to tortious conduct can make conduct reasonable under the Sherman Act. And that's the case that I am about to mention which is *Avaya, Inc. versus Telecom Labs, Inc.*, 838 F -- 838 F.3d 354, it's Third Circuit 2016. I have a copy, I'm going to hand a copy to the government.

THE COURT: Do you have a copy for the court?

MR. ALBERT: I think I only -- I only have one copy so we will provide one.

THE COURT: Very well.

MR. ALBERT: But that case basically stands for -- I mean in that case, a telecommunications equipment manufacturer sued a manufacturer of -- a provider of services for that equipment because it had previously, the service provider, previously had a license and got access to these proprietary maintenance codes and then the telecom manufacturer terminated the contract and sued the maintenance provider for continuing to access its proprietary information after the contract was over, and so sued for tortious interference and then the maintenance company countersued for Sherman Act violations and saying essentially you're trying to suppress competition for maintenance services. And the Third Circuit found that it was error to dismiss the manufacturer's tort claims and further found that the error tainted the jury's finding against the manufacturer on the antitrust claims because if the jury found that the maintenance company's conduct was tortious, that could have made the manufacturer's alleged anticompetitive conduct undertaken to combat tortious conduct reasonable and not in violation of the Sherman Act. That is -- that is another aspect of the guidelines and how

they came to be, and I think that the *Avaya* decision clearly stands for that proposition.

So Your Honor, our point is that, by their very structure, the guidelines were efficiency enhancing, they allowed for the pooling of resources in the estate administration phase, they also were efficiency enhancing because they provided a mechanism to address further tortious conduct that Blake & Blake was engaging in and blowing up -- blowing up estates. And as we have said, the efficiency enhancing was not just theoretical, it -- it increased the proportion of smaller cases that were worked and had a de minimus impact on price. Whether for purposes of antitrust doctrine you look at this as being reasonable and justified because it's ancillary, um, to the increase in efficiency, or whether you look at it as being effectively a joint venture, um, under either of those two antitrust doctrines we submit that the test for reasonableness is met here, but for purposes of today, um, this motion, we believe that the court can rule now that this -- that these unusual guidelines can't be pigeonholed as on their face per se violative of the antitrust laws and must be addressed under the Rule of Reason and our view is that that leads to a dismissal. I don't think the government -- if the court rules that this is a Rule of Reason case, I don't think the government will pursue it further as a criminal case. They

might have the option to pursue it civilly, but not as a criminal case. As we said, we think the court can rule that way now, but if the court thinks it would be useful to have a fuller factual record, we think the way to go on that is to have a hearing. Um, there are a number of issues around the background of the guideline, their impact, the potential expert analysis of the market and the impact on the market, um, the pooling of resources that could be addressed, and we think that the appropriate way to address it is a hearing prior to trial. So Your Honor with that --

THE COURT: Yes. Let me -- let me just see if I have the main thrust of your argument here in my notes. Now this agreement, and I think there is some question about the termination, that is, whether the agreement there's a violation of the statute of limitations here, I think that is a valid argument or appears to be, but it seems to me now your argument is focused on the agreement came into effect only when the two firms had invested some considerable amount of money in the venture; is that right?

MR. ALBERT: Yes.

THE COURT: That is number one. Number two, that the agreement was efficient enhancing, correct?

MR. ALBERT: Yes.

THE COURT: And number three, that only a small amount of estates were involved in this -- that came into play

under the application of the agreement; is that correct?

MR. ALBERT: Yes.

THE COURT: All right. Anything else?

MR. ALBERT: And just that in the real world, the impact of this agreement was actually helpful and not -- had no negative impact on price. Yes, those are the high points, Your Honor. Thank you with our request to reserve time to respond to what the government adds. By the way, I don't know if the court wants to hear from Mr. Mitchell now.

THE COURT: That is what I was going to ask next. I don't know if -- Ms. Kelley, do you want to respond to this now, or do you want to wait until after we hear the argument on the statute of limitations?

MS. KELLEY: Your Honor, I'm happy to address it now.

THE COURT: All right, very well. You may do so.

MS. KELLEY: May it please the court, Molly Kelley for the United States. Your Honor, I want to respond by addressing two points. First, I want to clarify the legal standard that applies to this action. Then I'll address why the per se rule applies and how it applies here.

So first as the court well knows, this is a criminal case and the Federal Rules of Criminal Procedure apply. We have a valid indictment, and counsel has raised a factual dispute about the very nature of the charged agreement. The government objects to any consideration of factual material

outside of the indictment at this phase. In fact, the nature of the charged agreement is the ultimate question and cannot be decided without a trial on the merits. In particular, I would like to draw the court's attention to the Tenth Circuit case, *United States versus Pope*. There, the Tenth Circuit affirmed this court's correct decision to deny a motion to dismiss that was based entirely on facts outside of the indictment. Also, the *Pope* court explained that pretrial evidentiary hearings on the issue of guilt or innocence, essentially a mini trial, isn't permitted under the criminal rules.

Accordingly, the government requests that the court disregard the extraneous facts including the guidelines agreement and the charts that counsel just showed to Your Honor.

We also requested the court decline to hold a pretrial evidentiary hearing, and we request that the court permit this matter to proceed to trial. And at trial, the government intends to prove exactly what we have alleged in the indictment that this was a per se violation of the Sherman Act. And our evidence will go beyond the mere guidelines document. We will also have witnesses who will explain how it operated exactly like a classic customer allocation conspiracy.

So just to back up for a second, I want to just

explain a little bit more about the per se rule. Now, according to the Supreme Court, certain types of restraints are so predictably and predominantly anticompetitive that they are categorically deemed unlawful per se. These categories of restraints include price-fixing, bid-rigging, and allocation, whether it be an allocation of territories, products or customers. And as counsel correctly pointed out, if these restraints are present in any market, the per se rule can apply.

Now here the indictment alleges a customer allocation agreement. That is, an agreement between horizontal competitors not to compete. Now, an important point that I want to make is that the indictment here, the offense described in the indictment, is more than a mere label. A grand jury found probable cause to indict these defendants for this offense. Now in our paper we request that the court make a pretrial ruling that the per se rule applies to this case.

THE COURT: Yes, I intend to do that, counsel.

MS. KELLEY: Thank you, Your Honor. In accordance with the *Suntar Roofing* case. So at trial I just want to clarify how the per se rule will apply. It's accurate that the per se rule has evidentiary significance. It forecloses certain avenues for the defense to defend the case. So, for example, it would be improper and inadmissible for a

defendant in a per se antitrust case to essentially admit what we call in an antitrust world a naked restraint of trade. But to say the jury should acquit because actually the naked restraint was justified by a need to prevent damage to the business. Or the naked restraint was okay because the prices at the end of the day were reasonable. The per se rule says none of that is proper in a per se antitrust case.

On the other hand, the per se rule does not foreclose a defense that, in fact, this wasn't a naked restraint at all. In fact, the agreement was ancillary to some legitimate joint venture. A joint venture would be characterized by a substantial integration, both partners putting forward capital and technology to create something new, sort of, for example, in the *Polk Brothers* case that both parties cite, there, there was a product allocation between the two parties, but that was necessary and related to the creation of a joint retail facility and joint parking lot.

If those defendants were in a criminal case, the jury would have to acquit them because that would not be a per se violation of the antitrust law. Similarly, in the *BMI* case, yes, there was a price-fixing agreement related to and in support of the blanket copyright music licenses that they were creating. Similarly, if that had been a criminal case

and they had been charged with a per se violation of the Sherman Act, the jury would have been instructed to acquit because that's not a per se violation. Here in the heir location services industry, if a defendant were able to say yes, there was a customer allocation but it was ancillary and in support of some joint venture, say the creation of a genealogical library or a genealogical database, something new, then that too would not be a per se violation. But here, the government is aware of no such legitimate collaboration between these defendants. And, at trial, we intend to show that this agreement operated exactly like a classic garden variety customer allocation agreement.

Now, I'll just turn briefly to addressing some of the questions that the court asked Mr. Albert. Um, first the court asked if it was the defendant's position that the agreement only came into effect when the parties had invested money into the venture. That's irrelevant under the *Cadillac Overall Supply* case that we cite in our brief. That case involved the garment rental industry, and defendants attempted to justify their agreement by saying, without the allocation, there would be a substantial raise on the account and it would -- that they would lose their investment. It's irrelevant in a per se antitrust case.

Next, the court asked Mr. Albert if it was the defendant's position that the agreement was efficiency

enhancing. Well, what the *Polk Brothers* case teaches is that we look to the type of restraint at the time it was entered into. And here, at trial, the government intends to prove that this was a classical customer allocation scheme at the time it was entered into.

Additionally, Your Honor asked Mr. Albert if it's the defense position that only a small number of estates were affected. This consideration is also irrelevant under the *United States versus Cooperative Theatres* case. There the defendants also tried to define the conduct by saying it only affected a small amount of business. That's irrelevant. Unless Your Honor has further questions on this point, I will turn it over.

THE COURT: No, that is fine. You may -- you may be seated, counsel. Do you wish to respond to that now, counsel, or do you want to reserve until after we hear the argument on the statute of limitations?

MR. ALBERT: I think we would like to respond now if we could just have one moment, Your Honor.

THE COURT: Yes, you may have a moment.

(Brief pause in proceedings.)

MR. ALBERT: Your Honor, I'm going to try to be very brief. It is, of course, a legal ruling. It is a legal ruling as to whether this is per se or Rule of Reason. There's no dispute about that. The question is how and when

can this court make that determination.

In our view, the guidelines in and of themselves enable the court to say this is just not a classic. It's just not -- it's just not one of the classics. It's strange, it's unusual, and the industry is unusual. And under those circumstances the court has enough to make that ruling at this time.

Now, I must say it's surprising for the government to try to argue in my mind that the guidelines themselves the court can't look at them. It's just like a -- I mean it -- this case peculiarly is like a contract case. In a contract case, the party saying they breached or arguing anything based a contract can't avoid people looking at the agreement. You know that is something that they are stuck with. And if you look at that agreement and you just can basically consider how this industry generally works, you can see it doesn't fit into the little narrow box. And we think the court can make that decision now.

With regard to whether there should be a hearing or not, if the court wanted to have more information --

THE COURT: I don't think I'm going to have a hearing, counsel, so just go on.

MR. ALBERT: Okay. Um, Your Honor, another argument that the government made is in order for this to be efficiency enhancing it has to be something new, you have to

be creating something new. That is -- that is not borne out by the case law. In the *BMI* case, it is -- that was not the joint licensing for music was not something new, it existed. In many of these cases, the product or service is not something brand new, it's -- it exists, it's being made more efficient, and it's being made more productive through the existence of the agreement. In every one of these cases that the government argues or the plaintiff argues, that's just a naked -- that's just a naked division of markets. It's just a naked price fix. And then you take two steps back and you look at the whole thing and you see that it's not naked. And now -- and the government said and the government this is a classical -- a classical horizontal agreement but they have not identified any agreement that's like it. And when you look into the cases, that is what the courts are doing. They're searching through and they say, you know, one of the cases is *Procaps* where a party argued oh my gosh, we had a legitimate joint venture and then one of the partners to the joint venture merged with another company and then they took that company's manufacturing capabilities off the market. And that's changed this into a naked horizontal agreement to reduce capacity because the -- no, you have to look at the whole thing. You can't just look at that one little aspect of it. Yes, they took the manufacturing capability off the market, but it was part and

parcel of a whole economic relationship and all of these cases are about looking at the economic relationship. And when you do that, um, when you do that, you can see that it's not a naked restraint. The only other thing I would just point out is I think what the government is saying under their view of life, if the court doesn't grant -- doesn't grant the motion, that evidence, all evidence that goes to whether it is per se or Rule of Reason comes in in front of the jury during the trial, and then presumably at the end of it, we both move for the legal ruling and Your Honor decides it. That -- that is a way to go. We don't think it is the best way to go because then the jury is going to be subject to a lot of evidence that either maybe they shouldn't have heard or maybe they have heard for a different reason and it would be a confusing trial for the jury. I just point that out to Your Honor.

THE COURT: Very well. Thank you, counsel.

MR. ALBERT: Thank you.

THE COURT: You may now address the statute of limitations issue.

MR. MITCHELL: Thank you, judge, appreciate your patience. Um, good morning, Your Honor.

THE COURT: Good morning.

MR. MITCHELL: My name is Jim Mitchell and I represent Kemp & Associates, the corporate defendant. And I am going

to address statute of limitations as everyone has said. Um, we have briefed these issues somewhat extensively already for Your Honor and I certainly do not want to repeat everything that was said, but there are a number of key issues that I think would be worth emphasizing today.

So what are statute of limitations? They exist for a well established concern under the law. That is repose. A person need not worry about defending him or herself from charges relating to conduct that is invariably so old, in some cases the evidence is stale, or in other cases just completely not even there. As a result, Your Honor, our Supreme Court has said multiple times that statutes of limitations should be liberally interpreted in favor of this --

THE COURT: Let me just -- let me just interrupt, counsel.

MR. MITCHELL: Please do.

THE COURT: This agreement ended in 2008, right?

MR. MITCHELL: It did, Your Honor.

THE COURT: Now, the government argues that there were facts however that extended that time. Now, can you address that?

MR. MITCHELL: I certainly can, Your Honor.

THE COURT: Very well.

MR. MITCHELL: What happened, and I'll start by saying

what happened in 2008 because it was alluded to by Mr. Albert. On July 30th, 2008, Daniel Mannix, the defendant here, sent an e-mail to his administrative staff. And he basically said, and I'll quote it specifically for Your Honor so it's attached to Mr. Albert's declaration, what he wrote, quote, "the formal agreement that we have had with B&B for the last decade is over," end quote. It couldn't be any clearer. At that point this time, Your Honor, what happened and it's not only what Mr. Mannix said, but it's played out by what actually happened, indeed there were no more allocations of heirs under the guidelines after July 30th, 2008. The government, upon our request, gave us a bill of particulars. And we said to them give us a list of all of the estates that are affected by the conspiracy. And they gave us a list, it was 269 estates, Your Honor. And we looked at that list and we went through it and we determined that the very last date that any estate on that list had ever been subject or made subject to the guidelines by either Kemp or Blake & Blake was, in fact, July 30th, 2008.

So our view is, as Your Honor mentioned, that the conspiracy, the scope of the conspiracy, the purpose of the conspiracy, and the wrongful quote, societal danger that the government is alleging here, is all over as of July 30th, 2008. The government, of course, has a different view.

What the government says is that no, things happened after 2008. There were things that happened in the form of administration of the probate of the estates. And what happens, we don't deny it, Your Honor, once an estate is in probate, there is a period of time that it has to actually be probated. And there are things that can make that process of probate extend for any number of years and it can vary. Depends on what jurisdiction you're in, some jurisdictions move faster than others. Depends on how many heirs there are. Depends on sometimes new assets are found, sometimes new heirs are found. All of these things can change the length and the nature of what happens.

THE COURT: So why does that not toll the statute?

MR. MITCHELL: Well, Your Honor, it doesn't toll the status because it has nothing to do with the evil that is charged in this indictment. That is market allocation. No suppression of competition, no market allocation is going on at all. All that's happening in that period of time is the routine processing of the probate. The hiring the lawyers, the gathering information. Yes, there is trading back and forth of -- of communications sometimes when necessary between the heir location services and indeed as the government points out, its indictment does have language in it that says sometimes the money comes out, the heirs have to be paid, and there is -- there is distribution of the

fees to the, excuse me, to the heir location service company. That is not what is charged as the wrongful conduct. That, Your Honor, are the results of the wrongful conduct. And we have cited a lot of cases for the court that say when you have these types of situations where the wrongful conduct, the thing that is the target of the indictment is over, but there is some sort of tail, something that happens after the fact, that is not -- it doesn't require or it doesn't involve the actual wrongful conduct that is so clearly charged in the indictment or charged as the wrongful act, that doesn't equal extension of the statute of limitations for purposes of the conspiracy. And that's exactly what we have here, Your Honor.

Part of the problems, as well, statute of limitations are very concerned with definiteness and not arbitrariness. And if you took the government's position here, Your Honor, they would have those issues in spades. What would happen here is because of the variability of the way these estates are administered, because there are so many different ways that things can slow down or speed up, someone market -- even if you did a wrongful market allocation of these heirs back in 2008, you would have no way whatsoever to know whether your statute of limitations was going to run five years later, 10 years later, 20 years later. It just doesn't make any sense. That's the real concern with all of

the cases under the law.

Of the cases, Your Honor, I know I'm skipping around, I'm trying to answer Your Honor's question.

THE COURT: Oh, no, I think you're doing okay.

MR. MITCHELL: The cases that the court gets cited by the government are different. They're bid-rigging cases, yes, but they have a significant difference in two different ways from what our cases are, what our case is here and the cases we cite.

One, in those cases, I'm going to read from -- in those cases the court there -- the court in those cases was able to conclude from the substance of what was being charged that, in fact, the central purpose, scope of the conspiracy, was economic enrichment, payment of money. That, I submit, is not what we have here. It is not what they charged in the indictment. If you look in the indictment at the description of the offense, there is two paragraphs under it and they both say only things about market allocation and suppression and market allocation of heirs. Towards the end, when they have a list of a bunch of things that say oh these are the manner and means of the conspiracy, yes they mention the payment of money but that is not the scope of this indictment as described.

The other thing that separates this case, Your Honor, from their cases, is what I call the indefiniteness or

duration of the supposed wrongful conduct. For example, they cite and rely on two Tenth Circuit -- or one Tenth Circuit and one, I think, Eighth Circuit bid-rigging cases where they say that the -- or the court found that the bid-rigging wasn't just the end of the statute of limitations, didn't start the limitations period running, but it extended through the point in time when the payment for the underlying contract went on.

But in those situations, Your Honor, two of them, *U.S. V Evans & Associates*, the bids were let in September of 1979 and the last payment on the contract was 1981. Less than two years. The other one they rely on, *Northern Improvement Company,* the project was awarded in March of 1980, and the last payment was July of 1981. In that case just a little over a year. That is very different, Your Honor, than the situation we have here where if you took the government's position, you would have many, many, many years that these statute of limitations would remain open, and no one could really tell, as I said at the outset, what -- what the end of the day was going to be because there are so many events and circumstances, all of the variables to how the estate is administered that would never allow you to know what is going to happen and when there is going to be a point in time when you could actually say the statute of limitations has started running or ended running.

That, Your Honor, is the very reason we have statute of limitations in the first place, this concern with repose. And if you accept the government's view, that is going to be a very unworkable and contrary to congressional policy application here.

One minute, Your Honor. I did want to say, Your Honor, if you will allow me to go back to something. Now, we have cited for Your Honor a number of cases where there is this problem, where there is this conduct that is the wrongful conduct or the conduct in furtherance of the conspiracy outside of the statute of limitations and there is this tail that something that happens that goes past and into the limitations period. And we cited, Your Honor, a bunch of the cases in our briefs *Dougherty* is one, the *Grimm* case is one, the *Hare* case is another one. I don't want to go through those cases again, I'm happy to if Your Honor wants me to, but there is one case that I kind of gave short-shrift to in our brief and I think it is something that I would like to walk through for the court because I think is a really good example of this issue and sort of crystalizes the very point I'm talking about. It's called *United States versus Great Western Sugar Company,* and it's from the District of Nebraska, a 1930 case. Granted it is old, but it is very helpful, I think.

The case, Your Honor, concerns a price war that took

place in the beet sugar manufacturing industry. As best as I can understand it, this is an industry where companies would buy the raw beet sugar from farmers, take it, process it at their manufacturing plants and then sell it to some ultimate customers.

Now, apparently some competitors learned that another competitor was going to build a manufacturing plant in their area and they got upset. So what they did was they got together and they conspired to basically buy up all of the existing beet product from the farmers by paying exorbitant prices for the beets, essentially cutting off the supply to the guys who wanted to build the factory. The result, Your Honor, of course, was that contracts were signed where and purchases were made of beets at inflated prices and that lead these competitors to be indicted under the Sherman Act for an illegal restraint of trade. And a limitations issue arises in this case for basically the reasons we have here. The contracts that these sort of contracts that inflated prices with wrongful prices, everybody acknowledged they all existed outside of the five-year statute of limitations, or it may have been three in that case, I can't remember, outside the limitations period. But what happened inside the limitations period was that on occasion some of these beets were delivered from the farmers to the manufacturers and paid for. So there was this activity within the period

of time that the limitations period covered. And the government, of course, relied on that to say aha, that makes this timely, those are acts in furtherance of the conspiracy, blah, blah, blah. Well the courts correctly and I think in words that are really relevant here rejected that argument. They said basically basing their view on what conduct was actually charged as wrongful in the indictment, this was not timely. And here I'm going to quote Your Honor from the case. Quote, "the act of price warfare was not the acceptance of the beets or paying for them or slicing them up in factories. It was the price boost by offer to contract at the accepted price and contracting," end quote. The court went on to say that the delivery and the payment for the beets were quote, "just things that transpired in the course of business after the wrongful price war," end quote. And that is Page 154.

I think the parallel here is striking. Even if the conduct, the market allocation were wrongful, of course we deny that and vehemently oppose that conclusion, but it ended. It ended in July of 2008. And the tail, the routine administration of the estates in this case were quote, "just things that happened in the course of business after that market allocation." So I think it's pretty clear, Your Honor, that the government is stretching here and they didn't bring this case in a timely manner. Frankly, they

had every opportunity in our view to do that. We have cited in our briefs some of the points -- some of the stuff we found in discovery that made clear that the government had people coming to them certainly in 2014 and apparently back as far as 2008 and '09 where this issue was being raised by people. Now, an interesting side light to that, Your Honor, and I'll just throw it in here, statute of limitations are concerned with repose. Apparently, on behalf of two former and disquieted employees of Kemp, they had somebody approach the Department of Justice in San Francisco back in, I think, 2008 or '09. We learned about this through discovery. We asked the government about it and said is there anything more to this? And they apparently checked with the San Francisco office and found nothing. Now I would find it hard to believe that if that approach had happened, there wouldn't be some record but it doesn't exist. Now, I'm not saying the government is hiding it, but so much time has gone by that it's not there any more. And that strikes me as the very reason we have statute of limitations in the first place to address concerns like that because it could have been very helpful if we had a document to that point to explain or see what happened here with the statute of limitations. So I'm happy to answer any questions that Your Honor has but --

THE COURT: Thank you, counsel.

MR. MITCHELL: You're welcome.

THE COURT: You may respond, Ms. Kelley.

MS. KELLEY: Thank you, Your Honor. Again, as the court well knows, at this stage the court is bound by the language of the indictment. Here the indictment alleges a broad conspiracy involving not only allocation, but also payments derived from that allocation within the statute of limitations. And a commonsense reading of the indictment is required. Allocation is not an end in itself. The object was to profit from the allocation. And specifically the indictment alleges two types of payments that were part of this conspiracy. The indictment alleges that the conspirators received noncompetitive contingency fees within the statute of limitations and that's alleged at Paragraph 11(h) and 11(i). That type of payment delays the statute of limitations under *Evans & Associates,* the Tenth Circuit case.

Additionally, the indictment also alleges payoffs between conspirators within the statute of limitations. That also delays the statute of limitations under the *Morgan* case and the *Triple A* and *Walker* cases from other circuits.

Now these payoffs between co-conspirators involves continued concerted action, not mere administration, not mere results of the conspiracy. That's continued concerted action and that tolls the statute of limitations. The

government, having alleged as such, should be permitted to prove these overt acts in furtherance of the conspiracy within the statute of limitations to the jury at trial. Now to the extent the defendants are planning to submit a withdrawal of defense, they will bear the burden of proof at trial. Unless the court has any questions for me?

THE COURT: No. I still am not clear. Are you saying that the statute of limitations does not apply to this case?

MS. KELLEY: Your Honor, I'm -- I'm saying that the indictment alleges overt acts within the statute of limitations. So the statute of limitations does not bar this case. And at trial, we will prove acts in furtherance of the conspiracy that happened within five years of the return of the indictment within the statute of limitations.

THE COURT: Even though the agreement was terminated in 2008? Now I still don't understand your argument, counsel.

MS. KELLEY: So the -- first without waiving our objection to consideration of facts outside of the indictment, the alleged conspiracy is that there was an allocation plus payoffs. Even if the allocation of the estates terminated in 2008, the conspirators continued to profit from their conspiracy. They continued to receive noncompetitive contingency fees from their customers which was the object of the conspiracy. They also continued to

pay each other from the spoils of their conspiracy. Both of those overt acts, happening within the statute of limitations, continues the conspiracy effectively.

THE COURT: Okay. Let's hear if there is any response to your argument.

MS. KELLEY: Thank you.

THE COURT: Any response counsel?

MR. MITCHELL: May I have two minutes, Your Honor? Would that be okay?

THE COURT: Pardon me?

MR. MITCHELL: May I have two minutes?

THE COURT: Yes.

MR. MITCHELL: Thank you. First of all, Ms. Kelley uses the word payoffs. That does not appear in the indictment. The indictment has a section at the end that says manner and means of the conspiracy. And that talks about the fact that certainly there were a point in time in all of these estates where the estate is probated and the money comes out and it has to get paid to the heirs and to the heir location services that actually did the work to cause the money to come out. That's what we're talking about. These are not the hidden payoffs. This is the routine compensation for the heir location services for putting in what could be years of work to get the estate to that point. So that's not what I would call a payoff that

is part of the actual wrongful conduct being alleged.

The other thing, Your Honor, I just want to say, every economic crime, I think you could say, has an object to make money. The question really is whether or not the substance of the criminal act charged in the indictment is over and when it's over. And here I don't think I have ever seen a clearer record where you have the actual defendant writing an e-mail saying that agreement, that market allocation agreement, is over as of this date.

And my last point, Your Honor, is although they seem to want to push the indictment read as a whole and move from the back to front what is the sort of the end of the day payments that I'm talking about, you got to look at the indictment because under the title description of the offense there are two paragraphs. They deal only with the suppression of elimination of competition through market allocation. They don't say anything about the routine stuff at the end including the fee payment. So I think that it's pretty clear what the indictment is saying is the wrongful conduct which ended again in 2008. Thank you.

THE COURT: All right, very well. Counsel, excuse me, what I would like to do is meet with my staff attorney and if I have any further questions I will come back on the bench and indicate what questions I wish to have you further address. Or if there is a basis to make some oral ruling,

I -- I will make an oral ruling. If not, I will take it under advisement. So those are the alternatives that will be addressed here in your absence and then I will let you know.

MR. ALBERT: Your Honor, thank you. I just, if I may, I would like to hand up a copy of that *Avaya* case that I mentioned that we --

THE COURT: Yes, you may do so.

MR. ALBERT: And I'll hand a copy. It is a little bit long to read but --

THE COURT: I want to also mention I have in the jury box two outstanding young men who are my externs during their term of law school. One is Brock Humberg, Brock, do you want to raise your hand. The other is Taylor Hadfield. They're both outstanding young men. And one of the great benefits that these externs have, I believe, which I never had when I was in law school, is to be with us and to meet you and if they have any questions because we have outstanding members of our noble profession here on this case, that they can get the spirit of you outstanding lawyers and maybe during this interim, unless they want to come back and meet with me or I don't know, they haven't had the benefit of going all through the briefing, but maybe this would be a good time for them to meet with you. Okay?

So we'll be in recess and I'll meet with my staff

attorney assigned to the case.

MR. ALBERT: Thank you, Your Honor.

THE COURT: Thank you very much counsel for your presentation. I think it has been very helpful and your briefing, I believe, has also been very well presented as far as your respective positions are concerned.

MR. ALBERT: Thank you.

THE COURT: Thank you very much.

(Recess.)

THE COURT: Again, counsel, thank you very much. This has been a -- is an interesting case and I'm going to give you just some comment as to the court's inclinations. It does seem to me that this is a rather unique and unusual case. My view of the Sherman Antitrust Act involves cases that this case does not, in my view, fit like I would like to see cases fit under the Sherman Antitrust Act.

I'm going to take the issue of the statute of limitations, I'm going to give that some further consideration before I make a ruling on that. I think, again, this is -- because it is a rather unusual and interesting case in my view that there may be some application of the statute of limitations here that are going to have to be applied possibly. I'm not sure on that yet. I wanted to ask you, however, the question on the -- whether what standard applies here as to how this case

should be addressed under the Rule of Reason or the per se standard. My inclination is that it is a Rule of Reason case or standard. Now, what effect does that have, counsel, can you tell me?

MS. KELLEY: Yes, Your Honor. Your Honor, the government's position is that the per se rule applies to the indictment.

THE COURT: Yes, I understand. You have made that very clear, counsel.

MS. KELLEY: In the event that Your Honor decides that the Rule of Reason should apply, the government will reassess its options at that point. But --

THE COURT: So maybe what I should do then is make that ruling because that's my inclination is to find that it is a Rule of Reason case because it is unique and unusual in my view. It doesn't affect a very large part of our society, it's just very narrowly focused, and so that will be my ruling. Now, if that -- and then hold in reserve the statute of limitations or do you want me to rule on that too?

MS. KELLEY: If Your Honor sees fit to rule at this time, it's Your Honor's prerogative.

THE COURT: Yes, that's my -- well, counsel, maybe I should ask the defendants in that regard. Did you understand what I am --

MR. ALBERT: I do, Your Honor. Um, we think that Your Honor's ruling on the Rule of Reason will likely complete the case so --

THE COURT: Well, what part will that complete? That's the part that I'm concerned with here. It seems to me, based on what I've said, and what I have heard, that it is my view because it is unique, it is unusual, it doesn't seem to me to fit the classic Sherman Antitrust Act type cases and that the -- it seems to me that it is a Rule of Reason standard. Now am I saying that correct?

MR. ALBERT: Yes, Your Honor, I think you are saying it quite right.

THE COURT: Yes.

MR. ALBERT: I mean I, you know, I guess the ball is in the government's court, but I don't think the government is likely to continue to proceed in a rule of reason case.

THE COURT: Maybe I don't need to address the statute of limitations then.

MR. MITCHELL: Well, and Your Honor, if I may, I don't mean to interrupt but if -- if Your Honor -- given Your Honor's view of the Rule of Reason, I, again, am not sure what the government's response would be, whether it is anticipated though they might try to appeal that issue. If that were to be the case, I think it might be as a matter of practical benefit to have, if there is going to be a statute

of limitations issue that they need to address or we need to address, to have that essentially be part of the appeal issue as well.

THE COURT: Well, I agree with that as well. Do you want to consider this first under the Rule of Reason position that the court is taking, and then indicate whether you are going to move forward. If you are, then I will -- I will rule on the statute of limitations before anything further is done.

MS. KELLEY: Your Honor, the government does not see that it will move forward with a Rule of Reason case.

THE COURT: I didn't understand that, counsel. The government would not what?

MS. KELLEY: If Your Honor decides to proceed under a Rule of Reason, the government would like to assess its options. But as we said in our paper, we don't intend to pursue a Rule of Reason case.

THE COURT: Well then --

MR. ALBERT: I'm sorry, Your Honor. I think Mr. Mitchell actually had a good point. I think that we have the court's ruling that it is Rule of Reason. I think that there is at least a chance that the government will appeal, we hope they won't, we hope that we could resolve it and maybe -- maybe we could. But, um, if the government does appeal, um, I think they would probably -- everyone --

it would be useful for everyone to have a ruling on the statute of limitations. So, um, one option, if your court may, would be to we have that ruling, we could speak to the government and see and then get back to the court in a few days.

THE COURT: I think that would be the way that I would like you to proceed, counsel. Is that okay?

MS. KELLEY: Yes, Your Honor.

THE COURT: All right. And then indicate that to the court and then I will decide it or maybe I won't have to decide, but either the case will be done or the court will then rule on the statute of limitations issue.

MR. ALBERT: Thank you, Your Honor.

MR. MITCHELL: Thank you, Your Honor.

THE COURT: Well, counsel, you have been wonderful and I just appreciate you and I hope you had a great exchange with my externs. I didn't mention they are both in their second year at the J. Reuben Clark Law School at the Brigham Young University and it's just wonderful to have these young students in the law become great professionals such as you. Okay. All right. We'll be in recess then, counsel. Thank you very much.

MR. ALBERT: Thank you, Your Honor.

THE COURT: You want to prepare an order for the court to sign?

MR. ALBERT: We will, Your Honor.

THE COURT: All right, very well.

MR. ALBERT: Thank you.

THE COURT: Thank you. We'll address down the road, if necessary, another trial date or whatever but that is stricken for now.

MR. ALBERT: Thank you, judge.

MR. MITCHELL: Thank you, Your Honor.

(Whereupon, the hearing concluded.)

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name this 26th day of June, 2017.

_____

Laura W. Robinson

RPR, FCRR, CSR, CP